92-2049

No.

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

FLOJO TRADING CORPORATION,

Petitioner,

v.

JANE H. BROWNING, MICHAEL G. STARNES, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To the Court of Appeals
For the Fifth Judicial District of Texas at Dallas

PETITION FOR WRIT OF CERTIORARI OF FLOJO TRADING CORPORATION

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June 23, 1993

QUESTIONS PRESENTED

1. Should the Texas courts be allowed to uphold a $70,000,000.00 Texas judgment against an unnamed and unserved defendant, squarely in the face of this Court's 1988 decision in *Peralta v. Heights Medical Center, Inc.*, holding that the Due Process Clause of the 14th Amendment requires that an unappealed Texas judgment against an unserved defendant must be vacated in a Texas bill of review such as the present case?

2. Does the Due Process Clause of the 14th Amendment void a state court judgment when the uncontroverted summary judgment record establishes not only that the judge had a direct personal interest of more than $100,000.00 in the case, but also that he "functioned as a team" with the Respondents' attorneys, and that his judgment was the product of what the Fifth Circuit has characterized as a "corrupt abuse of the judicial process" and a "fraud on the court?"

PARTIES TO THE PROCEEDING

Pat S. Holloway
Robbie Holloway
Flojo Trading Corporation
Humble Exploration Company, Inc.(now HECI Exploration Co.)
Sterling Pipeline Company
Jane H. Browning, individually and as co-executrix and co-trustee of the estate of William W. Browning, Jr., deceased
Michael G. Starnes, individually and as co-executor and co-trustee of the estate of William W. Browning Jr., deceased, and as co-trustee of the Browning Childrens' Trust
William W. Browning, III
Kathryn Browning
Averille Browning
Fallon Browning
Robert Browning

Flojo Trading Corporation has no parent or subsidiary corporation, and is not affiliated with any other corporation.

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PETITION FOR WRIT OF CERTIORARI OF FLOJO TRADING CORPORATION

Petitioner, Flojo Trading Corporation respectfully prays for a writ of certiorari to the Court of Appeals for the Fifth Judicial District of Texas at Dallas.

OPINION BELOW

The opinion of the Dallas Court of Appeals is reported in 840 S.W.2d 14 and is reprinted at p.1 in the separately bound Appendix filed by Petitioners, Pat S. Holloway and Robbie Holloway in this case, which this Petitioner adopts as its own Appendix.

JURISDICTION

Petitioner's timely application for writ of error filed in the Supreme Court of Texas was denied on February 10, 1993, and its timely motion for rehearing was overruled on March 24, 1993. The jurisdiction of this Court is invoked under 28 U.S.C.§ 1257(3).

CONSTITUTIONAL PROVISION

The constitutional provision involved is the Due Process Clause of the Fourteenth Amendment of the United States Constitution. It provides in relevant part:

> "No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ."

STATEMENT OF THE CASE

This case is a combined equitable bill of review and collateral attack brought by Petitioners, Pat S. Holloway ("Holloway") and his former wife Robbie Holloway ("Robbie"), in which Flojo was made an involuntary Plaintiff, to set aside a judgment by former Dallas District Judge Dee Brown Walker (the "Walker Judgment") in the prior case of *Jane H. Browning et al v. Pat S. Holloway et al.* (the "Browning Case").

In the Browning Case the Respondents here, the Brownings, had sued the Holloways and Holloway's companies, Humble Exploration Company, Inc.("Humble") and Sterling Pipeline Company ("Sterling") for damages and constructive trust based on fraud and breach of fiduciary duty.

Flojo Trading Corporation ("Flojo") invested in very small undivided interests in a number of Humble-operated wells on exactly the same proportionate basis as much larger participants in Humble's drilling programs such as Texaco, Inc., Columbia Gas Development Corporation, Santa Fe Minerals and others.

It is undisputed, and uncontroverted in the summary judgment record of this case, that at the time of the

Walker Judgment all of the outstanding stock of Flojo was both legally and beneficially owned by Bennie Jaehne, Herman Jaehne, Charles Adams, Joe Holt and Dean Johnson, key field and office employees of Humble. Holloway himself had never been a stockholder, employee or officer of Flojo and had never received any dividend, salary, or other payment, directly or indirectly, from Flojo. (Tr.IX:2153,2159).

It is likewise undisputed that neither Flojo nor any of its stockholders were either named as defendants or served with process in the Browning Case, and that neither Flojo nor any of its stockholders appeared before Judge Walker or waived service of process.

Nevertheless, the Walker Judgment entered in the Browning Case: (1) awarded Seventy Million Dollars ($70,000,000.00) as damages against Flojo, jointly and severally with the actual named and served defendants in the case; (2) imposed a constructive trust in favor of the Brownings on all the assets of Flojo; and (3) imposed another constructive trust in favor of the Brownings on all of the outstanding stock of Flojo owned by the five key employees of Humble, none of whom had been either named as defendants or served with process in the Browning Case.

Flojo timely and properly appealed from the Walker Judgment. But its appeal was dismissed by the Dallas Court of Appeals, along with those of the Holloways. The Dallas Court of Appeals assigned no reason whatever for the dismissal of Flojo's appeal, just as it assigned no reason for the dismissal of Robbie's properly filed separate appeal. *Humble Exploration Company, Inc. v. Browning*, 677 S.W.2d 111 (Tex.-App.--Dallas 1984) *dism'l reinstated* 690 S.W.2d 321 (Tex. App.--Dallas 1985, writ ref'd n.r.e.)(en banc), *cert. denied* 674 U.S. 1065 (1986).[1]

Flojo refused to join as a plaintiff in the present case, having had more than its fill of "Dallas Justice" in the Browning Case. Flojo preferred to pursue instead a collateral attack by its stockholders on the Walker Judgment in the Lee County case of *Jaehne v. Starnes* here in Giddings where a majority of its stockholders reside, and near where all its properties are located.

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1 Holloway's appeal was dismissed on the ground that he had "elected a federal remedy" when the trustee for his estate in bankruptcy had filed a defensive pleading in *Browning v. Navarro*, the federal action brought by the Brownings to enforce the Walker Judgment during the state court appeal thereof. But Flojo has never been a defendant, much less a plaintiff, in any federal action, and so could not possibly have "elected a federal remedy" to justify the dismissal of its state appeal. Because Flojo was never a party in any federal case, there is no contention that Flojo's claims in the present case are barred by federal res judicata.

In Holloway's petition in the present case, he named Flojo as an involuntary plaintiff under Tex. R. Civ. P. 39(a), providing that when a proper or necessary party refuses to join as a plaintiff, "he may be made a defendant, or, in a proper case, an involuntary plaintiff."

But Flojo was never actually served with any process in the present case either. Nor did it appear voluntarily or waive service of process. But the district court in the present case rendered summary judgment against Flojo in its absence, just as in the Browning Case, ruling that the Walker Judgment was valid as to Flojo notwithstanding its entire absence from that case also.

Flojo also timely and properly appealed to the Dallas Court of Appeals in the present case, asserting the voidness of the Walker Judgment as to it under the Due Process Clause of the Fourteenth Amendment, both because of lack of service and because of the disqualification of Judge Walker by reason of his financial interest and bias.

Flojo pointed out both to the Dallas Court of Appeals and the Supreme Court of Texas, the undenied lack of service on it and the following uncontroverted facts in the Holloways' summary judgment record establishing Judge Walker's unconstitutional interest and bias:

1. **JUDGE WALKER RIGGED THE JURY ISSUES FOR THE BROWNINGS.**

After working *ex parte* with the Brownings' lawyers on their jury issues, Judge Walker allowed them 95 numbered special issues amounting, with all their subparts, to 444 separate questions for the jury, all exactly as requested by the Brownings (1982 Tr. IX:1269-1315), along with 10 pages of instructions, also exactly as requested by the Brownings. (1982 Tr.IX:1259-68). He peremptorily denied each and every objection to the Brownings' issues made by the defendants. (1982 S.F. 3884-4120). The defendants requested 80 special issues and instructions of their own. (1982 Tr.XIV:2025-2109). Judge Walker peremptorily denied all 80 of the special issues and instructions requested by the defendants. Id.

Then he relented to allow the defendants one special issue, whatever they chose. They chose an issue on limitation (No. 87). The jury answered this issue in favor of the defendants. The jury found that all of the Brownings' claims to own Humble and for fraud by Holloway in connection therewith were barred in 1979 by both the 4-year and the 2-year statutes of limitation. (1982 Tr.IX:1315). Judge Walker then set aside this controlling jury finding, entered judgment n o v. for the Brownings on their claim to own Humble, and adjudged Holloway guilty of fraud. (1982 Tr.X:1421).

2. THE JURY THREE TIMES FOUND HUMBLE BELONGED TO HOLLOWAY; JUDGE WALKER AWARDED IT TO THE BROWNINGS.

The Brownings submitted three special issues to the jury on their claim to own Humble (Nos. 1,8 and 61). The jury answered all three issues in favor of the defendant Holloway. (1982 Tr.IX:1269, 1273 and 1294). Judge Walker disregarded all three jury findings and awarded Humble, worth more than Two Hundred Million Dollars ($200,000,000.00), to the Brownings.

3. THE JURY FOUND FOR HOLLOWAY 22 TIMES ON STERLING PIPELINE COMPANY; JUDGE WALKER AWARDED IT TO THE BROWNINGS.

The Brownings submitted **22** special issues to the jury with respect to their claims to Holloway's other company, Sterling Pipeline Company. The jury answered **all 22** of these Browning issues in favor of the defendant Holloway.[2] Judge Walker disregarded **all 22** of these jury findings and awarded Sterling, worth more than Fifty Million Dollars ($50,000,000.00), to the Brownings. (1982 Tr. X:1421).

4. JUDGE WALKER AWARDED $72,000,000.00 DAMAGES AGAINST HOLLOWAY, ET AL. FOR FICTITIOUS REDUCTION IN VALUE OF HOLLOWAY'S OWN COMPANIES.

Judge Walker also awarded $72,000,000.00 damages to the Brownings against Holloway and his companies.

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2 Nos. 15, 18, 23, 29, 32, 36, 36-A, 39, 39-A, 42, 45, 48, 51, 54, 58, 61, 65, 68, 76, 85 and 86; 1982 Tr. IX: 1276-1346.

This was derived from jury findings based solely on the testimony of one expert witness, which the defendants were not allowed to rebut, as to a totally fictitious $500,000,000.00 decrease in the value of Humble and Sterling between the 1979 date of suit and the 1982 trial date.[3] The jury repeatedly found these companies belonged to Holloway, not the Brownings. Holloway, Humble and Sterling were thus held liable for fictitious damages to themselves, while by the same judgment all their assets were transferred to Respondent, Starnes via constructive trust.

The jury twice found that the Holloway-Humble-Sterling defendants had caused "zero" damages to the plaintiff Browning Estate. (Issues Nos. 83 and 85, 1982 Tr.IV:1313-4.) There was no evidence that any of the stock or assets of Flojo had been paid for to any extent by the Brownings; yet constructive trusts were imposed for the Brownings on all of such stock and assets.

5. THE JURY FOUND PLAINTIFF STARNES EQUALLY AT FAULT AS DEFENDANT HOLLOWAY; YET JUDGE WALKER TRANSFERRED EVERYTHING HOLLOWAY OWNED TO STARNES.

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3 According to evaluations by the oil loan department of Republic National Bank of Dallas, Humble's bank, Humble actually increased in value from less than $15,000,000.00 in June, 1979, to more than $150,000,000.00 in 1982.

The jury also found that Holloway was no more at fault in administering the $30,000 Browning Childrens' Trust than his co-trustee, plaintiff Michael G. Starnes. (Issue No. 82, Tr.IX:1308). Yet Judge Walker by his judgment *n.o.v.* transferred all of the Holloways' properties and assets, including their Dallas residence, their Giddings home and farm, and Holloway's inherited family property, to co-trustee Starnes; and he denied all of Holloway's claims for contribution or indemnity from equally-at-fault co-trustee Starnes.

6. JUDGE WALKER'S JUDGMENT N.O.V. GAVE THE BROWNINGS MUCH MORE THAN THEY EVEN SUED FOR.

Judge Walker did much more than just disregard all jury issues favorable to the defendants. He gave the Brownings not just everything they asked for in their pleading; he gave them much more than they asked for and much, much more than they even attempted to show by any evidence. Thus he imposed, on the alleged basis of a "trust opportunity" (a doctrine which does not exist in Texas trust law) of the $30,000 Browning Childrens' Trust, constructive trusts for the Brownings on: (1) real property which had been owned by co-trustee Holloway's family for more than 60 years (1982 Tr.XX:2969); (2) the Holloways' residence in Dallas (1982 Tr.XX:2960); (3) their farm and home near Giddings (1982 Tr.XX:2960); (4) several thousand oil and gas leases and several hundred producing oil and gas wells, not described in the Brownings' petition, and concerning which no evidence had been introduced at

trial; (5) all the assets of non-party Flojo; and (6) all the stock of its non-party stockholders.

The Brownings principal witness Starnes had admitted on the witness stand that **none** of these "constructive trust" properties had actually been paid for to any extent by any Browning money. (1982 S.F. 1955-6).

7. LATER, JUDGE WALKER GAVE THE BROWNINGS EVEN MORE.

Then Judge Walker amended his original final judgment *n.o.v.* 2-1/2 months after he entered it in order to divest the defendants of an additional 125 undeveloped leases (Tr.XX:2191-9) and 55 more wells (Tr.XX:2190). These had been overlooked by the Brownings' receiver in his preparation of the judgment exhibits (which had commenced in the Humble office early during the trial). None of these additional properties were described in the Brownings' trial petition, no evidence had been introduced concerning them at trial, and there was no post-trial evidence or hearing to support the amended judgment.

8. JUDGE WALKER AND THE BROWNINGS ATTORNEYS "FUNCTIONED AS A TEAM" IN THE BROWNING CASE.

After *ex parte* meetings with Respondent, Starnes and Respondents' attorney, Kelsoe, Judge Walker appointed Mr. James Lovett, a C.P.A. and former partner of Coopers & Lybrand, as Chief Executive Officer of Humble during

the Brownings' illegal receiverships in which the trial was conducted. Mr. Lovett's uncontroverted summary judgment affidavit in the present record includes the following:

> "9. During the period of my employment by the Receiver, I met with Judge Walker in his chambers on approximately six occasions . . .Kelsoe and Ayres were present for at least four of the meetings. Michael G. Starnes attended some of them . . . at the meetings Kelsoe, the others and Judge Walker often talked freely and openly about the lawsuit . . .To my knowledge, neither Humble nor Holloway nor anyone connected with them was invited to attend the meetings.
>
> 10. At the meetings in Judge Walker's chambers, Walker, Sessions, Kelsoe and the others clearly functioned as a team to deal with the receivership and the above litigation . . . At more than one of the meetings, Kelsoe and Ayres gave Judge Walker orders affecting the aforesaid litigation and Judge Walker signed the orders without notifying any other parties. At the meetings, Kelsoe, Ayres, Sessions, Starnes and Judge Walker freely discussed the litigation.
>
> * * *
>
> 16. During the meetings with Judge Walker, Kelsoe, Ayres, Sessions and Hurt made many suggestions affecting both the receivership and the litigation that

was pending before the Judge. None of the suggestions was ever denied."

(Tr. II:442-5).

9. **"LIKEWISE, AT THE CONCLUSION OF COURT EACH DAY, A MEETING BETWEEN JUDGE WALKER AND [RESPONDENTS' ATTORNEYS] IN JUDGE WALKER'S OFFICE WOULD COMMENCE."**

The entirely uncontroverted summary judgment affidavit of Humble's unprepared trial counsel includes the following:

"6. Additionally throughout the...Browning litigation, there were long recesses in both morning and afternoon during which time Messr. Kelsoe and/or Ayres were in Judge Walker's chambers without attendance of Humble-Holloway attorneys... Likewise, at the conclusion of court each day, a meeting between Judge Walker and Messrs. Kelsoe and/or Ayres in Judge Walker's office would commence."

"7. During this multi-week procedure from late May until August 18,1982 Messrs. Kelsoe and/or Ayres regularly reposed in Judge Walker's chambers with the doors sometimes opened and the doors sometimes closed....* * * The Humble-Holloway interests were constantly confronted with a series of orders adverse to them, which orders could only

> have been generated through the joint efforts of Judge Walker, Mr. Kelsoe and/or Mr. Ayres. * * * From my first appearance before Judge Walker on the 26th day of May throughout the litigation, I was impressed that Judge Walker had grasped and embraced the position of the Brownings and was determined to exert his every effort to favor and advance the Browning interests as articulated and urged by Messrs. Kelsoe and Ayres."

(Tr.II:492-484)

10. JUDGE WALKER, WORKING PRIVATELY WITH THE BROWNINGS' ATTORNEYS ON THEIR JURY ISSUES, STATED THAT "WE ARE NOT GOING TO GIVE HOLLOWAY ANY JURY ISSUES" BECAUSE "UNDER OUR THEORY OF THE CASE HE IS NOT ENTITLED TO ANY."

Judge Walker worked privately with the Brownings' attorneys to prepare their jury issues, with no lawyer for the defendants present. (Tr.II:494 ¶3). At one of these attorneys' private work sessions (on a Saturday), Judge Walker stated that "**we** are not going to give Holloway any special issues", that "under **our** theory of the case he is not entitled to any" and so "**we** are not going to give him any." (Uncontroverted Affidavit of Judge Robert Hughes dated November 25, 1985, Tr. II:447-8; see also id. at 494 ¶7).

11. AYRES "OFTEN BRAGGED THAT THEY 'OWNED' JUDGE WALKER AND WERE 'WIRED' INTO [HIS] COURT . . . WALKER WAS INDEED THE SILENT PARTNER IN THE FIRM OF KELSOE & AYRES."

The summary judgment record includes the affidavit of Mr. Andrew L. Smith III, formerly a client of the Brownings' attorneys, Kelsoe and Ayres, and President of Smith Protective Services, Inc., the oldest and largest private security firm in Texas. As with the other affidavits, Mr. Smith's affidavit has been filed in the federal cases of *Holloway v. Walker* and *Browning v. Navarro* as well as in the present case; and neither Mr. Ayres, nor Mr. Kelsoe, nor Judge Walker, has ever denied or controverted any fact stated therein, even after being invited expressly by the Fifth Circuit to do so "if appropriate." *See Browning v. Navarro II*, 887 F.2d at 346.

Mr. Smith states as follows:

> In about 1976 at the offices of Kelsoe and Ayres on LBJ Freeway in Dallas, Ayres informed me of the relationship between Judge Dee Brown Walker and his new law partner Kelsoe. He explained that Judge Walker and Kelsoe were friends and that Kelsoe was Judge Walker's political campaign manager and personal attorney. In explicit terms Ayres stated that because of the arrangement with Judge Walker they were guaranteed to always win in his court. Furthermore, very important cases could be filed so that they were assigned to Judge Walker's Court.

The way Ayres explained it to me there was absolutely nothing left to chance. Even if the people they sued asked for a jury they would win either with a directed verdict or judgment N.O.V.

As the years passed Ayres who was never a modest man began to speak in bolder terms. He often bragged that they "owned" Judge Walker. He said that they were "wired" into the 162nd District Court where Judge Walker presided. On several occasions when I was in Ayres' office Judge Walker called him and Ayres actually instructed Judge Walker as to how to rule in cases that were then pending before Judge Walker. I came to believe based on what I saw and heard transpire between Ayres and Judge Walker that Walker was indeed the silent partner in the firm of Kelsoe and Ayres.

In about 1980 the investigative revenues of the Dallas Branch of Smith Protective Service, Inc. surged. When I inquired I learned that we were investigating a rich oil man named Pat Holloway for Ayres. What was most unusual was the way we were being paid, in cash. On one occasion Ayres called me at my Houston office in the spring of 1982 and told me that Mr. Holloway was in M. D. Anderson Hospital in Houston with cancer. He wanted me to penetrate the hospital's security and get all the information I could concerning Mr. Holloway's cancer condition. Although I could not get any information out of M. D. Anderson, I learned from

Ayres they had all the plans set to bring Holloway before Judge Walker where he would be "gutted".

(Tr.II:461-3)

12. JUDGE WALKER REPRESENTED THE BROWNINGS BEFORE OTHER COURTS IN THE BROWNING CASE.

Judge Walker, by his own admission, went before other judges *ex parte*, argued for, and obtained three separate court orders in order to retain jurisdiction over the Browning Case as the Brownings desired, despite the contrary ruling of the Acting Presiding Judge rendered after a contested hearing. (Tr. I:61-9; Tr.II:292-301, 378-87, 391; Tr. III: 672). But Judge Walker did not notify the defendants' attorneys so they could be present before the other judges. (Tr. II:292-4,297-9). Judge Walker obtained one of these *ex parte* orders on a Saturday evening, at the home of the ill presiding judge, with no notice to the defendants. (Tr. II:297-9).

13. JUDGE WALKER REPEATEDLY MET PRIVATELY WITH THE BROWNINGS' ATTORNEYS ABOUT HOW TO AVOID THE RULINGS OF THE DALLAS COURT OF APPEALS.

Judge Walker admitted that he had a number of private meetings ("I don't know how many we had") with the Brownings' attorneys about how to avoid the first ruling of the Dallas Court of Appeals vacating his Humble

receivership orders. As a result of these private conferences, in which the Brownings' attorneys instructed him they wished him to continue the receivership orders, Judge Walker defied the ruling of the appellate court. (Tr. I:74, 79, 82, 84 and 85).

Then, after the Dallas Court of Appeals issued its subsequent opinion, dated August 30, 1982, ordering the issuance of a writ of prohibition against Judge Walker to vacate the Humble receiverships previously held unlawful, Judge Walker met again privately with the Brownings and their attorneys to discuss how to avoid the writ of prohibition. This *ex parte* meeting was recorded by the court reporter. (Tr. II:500-Tr.III: 521).

At this meeting of the conspirators, Judge Walker said: "**We** have control of Humble through all of the hundred percent of the stock." (Tr. III:514). He said "**we** are in control and **we** are going to stay in control." (Tr.III:516-7). He said:

> "I have the original Humble stockholders' book in yonder locked up. I got it from the court reporters so I'll show you where it is in my office. I think **we'd** better have that."

(Tr.III:514). Referring to a case cited by the Dallas Court of Appeals, he said; "Had **we** all missed that one?" (Tr.III:519). Mr. Ayres answered: "Yes, **we** had." (Tr.III:519). At this meeting, Judge Walker approved the instructions to his private army of heavily-armed guards,

given by his receiver's attorney Sessions, to fire their shotguns at Humble's General Counsel C. Taylor Ashworth (a small, slightly-built former law clerk to Mr. Justice Brennan of this Court) if he put both his feet on the steps leading up to the Humble offices in reliance upon the order of the appellate court. (Tr.II:508-9). Sessions promised Judge Walker that "somebody is going to get shot if they do that." (Tr.II:508-9).[4]

14. JUDGE WALKER PERSONALLY WROTE A BRIEF TO THE DALLAS COURT OF APPEALS SUPPORTING THE BROWNINGS' POSITION.

After the Dallas Court of Appeals actually served on Judge Walker its **writ** of prohibition dated September 10, 1982 because he had defied its prohibition **opinion**, he responded with a letter brief to that court denying its jurisdiction and expressly preserving any "personal rights" in the Browning Case. (Tr.I:40). Here Judge Walker argues the erroneous and unsuccessful legal position of the Browning-Fairway plaintiffs in the consolidated Browning-Fairway case. He further asserts: "I do not concede jurisdiction nor do I waive any personal rights" (Tr.I:40).

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[4] Still later, when the Dallas Court of Appeals actually issued and served on Judge Walker its writ of prohibition after he had refused to comply with its prohibition opinion, he still refused to comply with such actually served writ, as he admitted. (Walker Dep. pp.390-91).

Flojo submits that the impact of these unbelievable events was greatly magnified as to Flojo, who was not named or served as a defendant, much less given an opportunity to prepare a defense to this onslaught of unconstitutional behavior.

In the present case, the Dallas Court of Appeals affirmed the judgment of the district court upholding the validity of the Walker Judgment against Flojo. Acknowledging the ruling of this Court in *Peralta*, *infra*, the court of appeals nevertheless affirmed the judgment against Flojo based on its failure to file proper pleadings in the district court in the present case in which it also was never served with process, and its failure to file in the district court its certificate of good standing from the Secretary of State of the State of Texas. *See* 840 S.W.2d at 22-5.

Flojo timely pointed out to the Texas Supreme Court the fact that it was never served with process in the present case, and had not appeared, or waived service of process, in the district court, so that the present judgment, as well as the Walker Judgment, was void as to it under federal due process and this Court's decision in *Peralta v. Heights Medical Center, Inc.*

REASONS FOR GRANTING THE WRIT

I. THE TEXAS COURTS SHOULD BE REQUIRED TO HONOR THIS COURT'S 1988 DECISION IN *PERALTA V. HEIGHTS MEDICAL CENTER, INC.* AND THE 160 YEARS OF PRECEDENTS IT UPHOLDS.

In *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80 (1988), the Court held that an unappealed Texas judgment rendered against a defendant not served with process, being void under both federal and Texas due process requirements, must be set aside in a Texas bill of review without any proof of other state law requirements of a Texas bill of review.

That is the present case. Flojo respectfully submits that it is important for this Court not to allow the Texas courts to continue, in the face of this Court's recent, unanimous decision in *Peralta*, to deprive persons of their "property in a manner contrary to the most basic tenets of due process." *Peralta*, *supra* at 86.

As stated in *Peralta*, *supra* at 84, notice to the defendant is an "elementary and fundamental requirement of due process", *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950), and "[f]ailure to give notice violates 'the most rudimentary demands of due process of law'. *Armstrong v. Manzo*, 380 U.S. 545, 550 (1965)."

Peralta also cites *Pennoyer v. Neff*, 95 U.S. 714, 733 (1878). There this Court ruled that a judgment entered against a defendant without service is "contrary to the first principles of justice", violates the Due Process Clause of the Fourteenth Amendment, and is "*coram non judice* and void." In *Pennoyer*, this Court also pointed out that it had, long before adoption of the 14th Amendment, held state court judgments rendered without service "absolutely void" under "immutable principles of natural justice." *Hollingsworth v. Barbour*, 29 U.S. (4 Pet.) 466,475 (1830); *Weldon v. Craig's Heirs*, 39 U.S. (14 Pet.) 147, 154 (1840); *Webster v. Reid*, 52 U.S. (11 How.) 437, 460 (1850).

If this Court allows the Texas courts, in the face of *Peralta*, to continue to disregard the "first principles of justice" and "the most basic tenets of due process", Flojo does not see how Texas litigants can reasonably expect the Texas courts to adhere to any of this Court's pronouncements on less fundamental, or more sophisticated, constitutional or federal issues.

The Brownings argued below, and the Dallas Court of Appeals accepted, that *Peralta* can be distinguished because in the Browning Case the jury found that Flojo was the alter ego of Holloway. And so it did, based solely on "expert" testimony as to the Texas law of alter ego by Judge Walker's personal accountant J. R. Hurt, whom Judge Walker had advised the jury was his own expert witness against the defendants. The defendants were not allowed to rebut or contradict this expert "legal" testimony by Judge Walker's own witness. It is uncontroverted in the

summary judgment record of the present case that Holloway himself had never been a stockholder, employee or officer of Flojo and had never received any dividend, salary, or other payment, directly or indirectly, from Flojo. (Tr:IX:2153-2159)

But irrespective of all that, the fundamental constitutional defect remains that neither Flojo itself nor any of its actual stockholders were ever named as parties or served with process, and so had no notice or opportunity to defend themselves against the alter ego claim. As the Supreme Court of Texas itself recently has held in another case, the fact that a trial court has made a finding that an unnamed and unserved corporation is an alter ego of an actual defendant is not ground for entry of judgment against the unnamed and unserved corporation. *Mapco, Inc. v. Carter*, 817 S.W.2d 686, 688 (Tex. 1991).

The Dallas Court of Appeals also upheld the Walker Judgment against Flojo's due process claim because of its failure to file proper pleadings in the district court in the present case, including its certificate of good standing showing it had paid its delinquent franchise taxes. 840 S.W.2d at 23, 24 and 25.

The Brownings appeared to abandon this ground for sustaining the Walker Judgment against Flojo in the Texas Supreme Court, after Flojo asserted there that it had never been served with process in the present case either, an assertion the Brownings in their response did not deny. Flojo pointed out that the record in the present case

shows no service on Flojo, and no appearance or waiver of service filed by it in the present case.

As the Supreme Court of Texas recently has ruled again, lack of jurisdiction because of lack of service is an issue which under Texas procedure can be raised for the first time in the Texas Supreme Court. *Mapco, Inc. v. Carter*, 817 S.W.2d 686, 687 (1991).

If the Brownings argue to this Court that the decision below, upholding the Walker Judgment against unserved Flojo, is based on an "adequate" state law ground, the short answer to this is that

> "while it is for the state courts to determine the adjective as well as the substantive law of the state, they must, in so doing, accord the parties due process of law. * * * a State may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it."

Brinkerhoff-Faris Co. v. Hill, 281 U.S. 673, 682 (1929).[5]

---

5 "State procedural grounds for disregarding federal claims cannot be found adequate if they fall below the requirements of due process." 16 Wright, Miller, Cooper & Crensham, *Federal Practice and Procedure*, §4025, p. 725 (1977). *See Peralta, supra* at 83 and 85.

The net result as to Flojo is that the district court in the present case has entered a judgment which is void for lack of due process, upholding the validity of another judgment which is void for lack of due process, to wit, the Walker Judgment in which Flojo was not even named as a defendant, much less served with any process.

Even if the demands upon the time of this Court are such that it cannot vacate every Texas judgment presented to it which has been rendered without notice or service in violation of "the most basic tenets of due process", Flojo can only hope that because it offers up in this single petition two void $70,000,000.00 Texas judgments against it rendered a decade apart, considerations of judicial economy may induce this Court to grant this petition and summarily reverse the courts below.

II. THE WALKER JUDGMENT IS VOID UNDER THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT BECAUSE OF THE FINANCIAL INTEREST AND PATENT BIAS OF JUDGE WALKER.

It is clear that Flojo was entitled under Texas law to raise the constitutional issue of Judge Walker's disqualification in the present case. The issue of constitutional disqualification may be raised, even by a served defendant,

for the first time on appeal. *Buckholtz Ind. School Dist. v. Glazer*, 632 S.W.2d 146, 148 (Tex. 1982)[6]

A. JUDGE WALKER'S FINANCIAL INTEREST OF MORE THAN $100,000 IN THE BROWNING CASE DISQUALIFIED HIM UNDER THE DUE PROCESS CLAUSE.

As detailed in the Holloways' separate petition in this case, Judge Walker, by *ex parte* orders entered in the illegal Browning-Fairway receiverships, took more than $100,000 out of the defendant Humble and paid it to (1) his personal lawyers and accountant who were then working for him personally without any further compensation in other, unrelated matters, and (2) his personal attorney whom he had privately hired to represent him personally in the Browning Case. Unless Judge Walker divested Holloway of his ownership of Humble, Holloway and Humble could have sought

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6 Even a failure to attempt to appeal does not waive the disqualification issue, for it "cannot be waived." *Ex Parte Miller*, 696 S.W.2d 908, 910 (Tex. Crim. App. 1985) (en banc). If Judge Walker was constitutionally disqualified, his judgment was "absolutely void" and subject to collateral attack. *Fry v. Tucker*, 146 Tex. 18, 202 S.W.2d 218, 221 (1947); *Browning v. Placke*, 698 S.W.2d 362, 363 (Tex. 1985) ("no capacity to act as a court"); see *Moore v. Dempsey*, 261 U.S. 86 (1933). Even if the Supreme Court of Texas had affirmed the Walker Judgment on its merits, it still would have been a "nullity" if Judge Walker was in fact constitutionally disqualified. *Chambers v. Hodges*, 23 Tex. 105 (1859).

reimbursement from Judge Walker and/or his personal attorneys and accountant for the moneys illegally paid to them by his orders which had been vacated by the appellate court three times.

The leading decision by this Court on disqualification of state judges for interest under the Due Process Clause of the 14th Amendment is *Tumey v. Ohio*, 273 U.S. 510, 533 (1923). There the Court decreed:

> "Every procedure which would offer a possible temptation to the average man as judge * * * not to hold the balance nice, clear and true * * * denies * * * due process of law."

In *Tumey* the Court held that the fact that the state judge received $12 in court costs if he ruled against the defendant disqualified the judge under the Due Process Clause. In the present case Judge Walker received a benefit of more than $100,000 by his judgment divesting the defendant Holloway of his ownership of Humble despite the jury's findings.

The financial benefit to Judge Walker was more immediate, obvious, direct and substantial than those which this Court ruled were sufficient to violate due process in *Aetna Life Ins. Co. v. LaVoie*, 475 U.S. 813 (1986), *Gibson v. Berryhill*, 411 U.S. 564 (1972), *Ward v. Village of Monroeville*, 409 U.S. 57 (1972) and *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968). The record in the present case presents far

more egregious due process violations than any this Court considered in *Tumey v. Ohio* or *any* of its progeny.

Judge Walker did not merely fail "to hold the balance nice, clear and true." He in fact dispensed with the scales of justice entirely by making his judgment before the trial began,[7] and by then assuming personal command of a private army of armed guards, lawyers, accountants and witnesses waging a possessory war of extortion against the defendants. But as to Flojo and its stockholders there was never even any formal declaration of war by Judge Walker; he wiped them all out completely by a sneak attack.

B. JUDGE WALKER WAS DISQUALIFIED UNDER THE DUE PROCESS CLAUSE BY HIS PATENT BIAS.

In *In Re Murchison*, 349 U.S. 133, 139 (1955), this Court ordained:

> "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always

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7 Within a few hours after the Brownings entered their first formal appearance in his court, Judge Walker ordered Humble into a devastating receivership, at the very beginning of the receivership hearing, before Humble's attorney even had a chance to cross-examine the plaintiffs' first witness. See *Humble Exploration Company, Inc. v. Fairway Land Company, et al.*, 641 S.W.2d 934, 936 (Tex. App.--Dallas 1982, writ ref'd n.r.e.).

> endeavored to prevent even the probability of unfairness."

Quoting the "possible temptation" rule of *Tumey v. Ohio* set forth above, the Court then stated:

> "Such a stringent rule may sometimes bar trial by judges who have no actual bias and would do their best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way, 'justice must satisfy the appearance of justice.' *Offutt v. United States*, 348 U.S. 11, 14...." *Id.*

There was no appearance of justice in the Browning Case. There was no absence of actual bias. The uncontroverted facts set forth above and in the separate petition of the Holloways establish actual bias and the certainty, not the probability, of unfairness. But they do more even than that. They show active, continuous collusion and conspiracy between Judge Walker and the Brownings' attorneys throughout the trial to deny the defendants any possibility of a real trial.

The egregious nature of the due process violations in the present, widely-publicized litigation justify this Court's summary reversal of the courts below to signal to all our citizens, as well as just all those in this small community and elsewhere throughout Texas who have been directly

affected, that judicial conduct such as former Judge Walker's in the Browning Case ultimately will not be tolerated anywhere in our system.

PRAYER

Flojo prays that the judgment of the Dallas Court of Appeals be reversed and rendered in favor of Flojo, thereby vacating, in its entirety, the judgment as to Flojo in Cause No. 82-5742-I and 79-9623-I, *Jane H. Browning, et al. v. Pat S. Holloway, et al.*, in the 162nd Judicial District Court of Dallas County, Texas, as being void ab initio.

Respectfully submitted,

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No. 92-2049

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In The

Supreme Court of the United States

October Term, 1993

FLOJO TRADING CORPORATION,

Petitioner,

v.

JANE H. BROWNING, et al.,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeals For The Fifth Court of Appeals District Of Texas At Dallas

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NationsBank Corporation (parent)

NationsBank, Texas, Corporation (parent)

NationsBank, Texas Bancorporation, Inc. (parent)

NationsBank Community Development Corp. (subsidiary)

NationsBank Housing Fund Development Corp. (subsidiary)

HECI Exploration Company, Inc. and Sterling Pipeline Company have no parent or subsidiary companies. NationsBank Corporation has numerous subsidiaries in other states.

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No. 92-2049

In The

Supreme Court of the United States

October Term, 1993

FLOJO TRADING CORPORATION,

Petitioner,

v.

JANE H. BROWNING, et al.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION

The Respondents, Jane H. Browning, et al.,[1] (the "Brownings") respectfully request that this Court deny the Petition for Writ of Certiorari by Flojo Trading Corporation ("Flojo"), seeking review of the judgment of the

[1] The Respondents are Jane H. Browning, Individually, as Co-Independent Executrix and as Co-Trustee of the Estate of William W. Browning, Jr.; Michael G. Starnes, Individually, as Co-Independent Executor and as Co-Trustee of the Estate of William W. Browning, Jr., as Co-Trustee of the Browning Children's Trusts, and as Special Trustee; Catherine Agnes Land Starnes; Kathryn Louise Browning Cook; Averille Adams Browning Dawson; William Webb Browning, III; Winifred Fallon Browning Vaughn; Robert Holland Browning; and NationsBank of Texas, N.A., f/k/a NCNB Texas National Bank, Successor to FDIC, as Receiver for First RepublicBank Dallas, N.A., Successor to InterFirst Bank Dallas, N.A., Individually and as Co-Trustee of the Estate of William W. Browning, Jr., Deceased.

Texas Court of Appeals for the Fifth Court of Appeals District in Dallas. That court's opinion in this case is reported at 840 S.W.2d 14.

JURISDICTION

The Court should decline to accept jurisdiction to review the judgment of the Texas court of appeals because Flojo did not timely and properly preserve in the courts below the questions it seeks to present here. In addition, there are independent and adequate state grounds upon which the lower court's judgment is based. *See Board of Supervisors v. Allman*, 423 U.S. 940, 96 S.Ct. 300, 46 L.Ed.2d 272 (1975). These matters will be discussed more fully under Reasons for Denying the Writ, *infra*.

STATEMENT OF THE CASE

I. Introduction.

Flojo's petition is a companion to the petition filed by Pat S. Holloway ("Holloway") and Robbie Holloway ("Robbie") in Cause No. 92-2048, *Pat S. Holloway and Robbie Holloway v. Jane H. Browning, et al.* These companion petitions are the culmination of 14 years of litigation between Holloway, sometimes joined by Robbie and Flojo, and the Brownings. Over 15 separate but interrelated proceedings (original lawsuits or original proceedings) have been filed, which have involved 16 separate

appeals. Portions of the history of this litigation are reported in the opinions cited in the footnote.[2]

A flow chart is provided in Appendix A at 1a-4a to assist the Court in relating the various proceedings to each other. Flojo was not a party to all the litigation; therefore, this brief will refer only to the portions of the overall litigation pertinent to Flojo.

In 1982, the Brownings obtained a substantial judgment against Holloway and his alter egos, including Flojo. In the 11 years since the entry of the 1982 Judgment, Holloway has pursued various collateral attacks on the 1982 Judgment. All of these attacks have failed.

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[2] *Flojo Trading Corp. v. Browning*, No. 3-91-256-CV (Tex. App. July 1, 1992) (unpublished); *Holloway v. Starnes*, 840 S.W.2d 14 (Tex. App. 1992, writ denied); *Starnes v. Holloway*, 779 S.W.2d 86 (Tex. App. 1989, writ denied); *Browning v. Ryan*, 756 S.W.2d 379 (Tex. App. 1988) (orig. proceeding), *rev'd*, *Holloway v. Fifth Court of Appeals*, 767 S.W.2d 680 (Tex. 1989); *Jaehne v. Starnes*, No. 14,693 (Tex. App. Sept. 23, 1987) (unpublished); *Browning v. Placke*, 698 S.W.2d 362 (Tex. 1985); *Humble Exploration Co. v. Browning*, 677 S.W.2d 111 (Tex. App. 1984), *dism'l reinstated*, 690 S.W.2d 321 (Tex. App. 1985, writ ref'd n.r.e.) (*en banc*), *cert. denied*, 475 U.S. 1065, 106 S.Ct. 1376, 89 L.Ed.2d 602 (1986); *Holloway v. Navarro*, No. 91-1541 (5th Cir. Jan. 3, 1992) (unpublished); *Browning v. Navarro*, 923 F.2d 377 (5th Cir. 1991) (*Browning v. Navarro IV*); *Browning v. Navarro*, 887 F.2d 553 (5th Cir. 1989) (*Browning v. Navarro III*), *reh'g denied*, 894 F.2d 99 (5th Cir. 1990); *Browning v. Navarro*, 826 F.2d 335 (5th Cir. 1987) (*Browning v. Navarro II*); *Browning v. Navarro*, 743 F.2d 1069 (5th Cir. 1984) (*Browning v. Navarro I*), *rev'g Browning v. Navarro*, 37 B.R. 201 (N.D. Tex. 1983); *Holloway v. Walker*, 784 F.2d 1287 (5th Cir. 1986), *reh'g denied*, 790 F.2d 1170, *cert. denied*, 479 U.S. 984, 107 S.Ct. 571, 93 L.Ed.2d 576 (1986); *Holloway v. Walker*, 800 F.2d 479 (5th Cir. 1986) (Bolivian consul matter); *Holloway v. Walker*, 811 F.2d 263 (5th Cir. 1987) (sanctions).

Flojo's appeal in this case is Holloway's last-ditch effort to use an alter ego, Flojo, to set aside the 1982 Judgment not only as to that alter ego but also as to Holloway. As shown below, this Court should reject this argument and lay this 14-year litigation to rest.

II. History of the Browning-Holloway Litigation.

The Brownings filed the original suit in 1979 (the "1979 Case") against the Holloways, Humble Exploration Company ("Humble," now known as "HECI Exploration Company"), and Sterling Pipeline Company ("Sterling"), alleging fraud and breach of fiduciary duties (App. A at 1a & 4a, see A.1; the 1979 Case is identified by the letter "A" on the flow chart.) The Brownings specifically alleged that Holloway created and operated companies, including Flojo, in disregard of the manner required by law, for the purposes of profiting from lease acquisitions of oil and gas production or related activities belonging to the Brownings. The Brownings specifically requested relief against Holloway, Humble, Sterling and any other entity or organization through which Holloway had conducted the business in the preceding eight years.

Holloway filed bankruptcy proceedings for Humble, Robbie and himself and removed the 1979 Case to the bankruptcy court. (App. A at 1a & 4a, see B.1; Holloway's bankruptcy proceeding is identified on the flow chart by the letter "B.") The bankruptcy court subsequently remanded the case to the trial court but retained jurisdiction for enforcement of any resulting judgment.

Following a lengthy trial, the jury found that Holloway had formed or conducted the affairs of Flojo and other companies in such a manner that such corporate entities were each his alter egos. (Special Issue No. 68.) In addition, the judgment (the "1982 Judgment") held, as a matter of law, that based upon the evidence presented in the 1979 Case, Flojo was Holloway's alter ego. The 1982 Judgment awarded the Brownings damages, a constructive trust or both against Holloway, Robbie and Holloway's alter egos – Humble, Sterling, Holloway Exploration Company and Flojo. (App. A at 1a & 4a, see A.2.) All the parties against whom the judgment issued, including Flojo, appealed. (App. A at 1a & 4a, see A.3.)[3]

Because no supersedeas bond was filed in conjunction with the appeal from the 1982 Judgment, the Brownings filed *Browning v. Navarro* in the federal district court under its bankruptcy jurisdiction to enforce the constructive trust portions of the 1982 Judgment. (App. A at 2a & 4a, see D.1; *Browning v. Navarro* is identified on the flow chart by the letter "D.") In response, Holloway, Robbie, Humble, Sterling and Don Navarro, the newly-appointed trustee of Holloway's bankruptcy estate and Humble's bankruptcy estate, all challenged the 1982 Judgment as void. The federal district court sustained the defendants'

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[3] Even prior to filing the notice of appeal in the 1979 Case, Holloway, Humble and others initiated the first of multiple attacks on the 1982 Judgment by filing *Holloway v. Walker*, a civil rights suit in federal court. (App. A at 1a & 4a, see C.1; *Holloway v. Walker* is identified on the flow chart by the letter "C.") The Brownings eventually obtained a summary judgment against Holloway, which was affirmed on appeal. Flojo was not a party to *Holloway v. Walker*.

arguments and held that the 1982 Judgment was void because the 162nd Judicial District Court, with Judge Dee Brown Walker presiding, had lacked jurisdiction under the bankruptcy court's remand order. *Browning v. Navarro*, 37 B.R. 201, 210 (N.D. Tex. 1983) (App. A at 2a & 4a; see D.2.)

The Brownings moved to dismiss the appeal from the 1982 Judgment due to the appellants' inconsistent claims in the federal court. The court of appeals held that the large record before it showed that the appellants had made no objection to Judge Walker's trying the case on any alleged restrictions contained in a Stipulation and Agreement between the parties in the bankruptcy court. It further found that the appellants had gambled on the verdict in the trial court before Judge Walker and having lost, then pursued their appeal, while at the same time advancing their "leash" theory in the federal courts. *Humble Exploration Co. v. Browning*, 677 S.W.2d 111, 113-14 (Tex. App. 1984). (In oral argument, appellants' counsel told the court of appeals that the bankruptcy court's remand order was like "a 'remand on a leash' whereby the Bankruptcy Court could, at any time, grasp the leash and return the dispute back to that court regardless of its status in the state system." 677 S.W.2d at 113, n.3.) The court of appeals held that the appellants had trifled with the state courts by their conduct and dismissed the appeal. 677 S.W.2d at 114-15. (App. A at 1a & 4a, see A.4.)

Several months later, the Fifth Circuit reversed the federal district court's order in *Browning v. Navarro*. *Browning v. Navarro*, 743 F.2d 1069, 1086 (5th Cir. 1984) (*Browning v. Navarro I*). (App. A at 2a & 4a, see D.3.) The

Texas court of appeals initially granted *ex parte* the appellants' "Motion to Withdraw Judgment Granting Appellees' Motion to Dismiss." Five months later the *en banc* court of appeals held that the appellants' motion had been wrongfully and purposely denominated to obtain a second motion for rehearing in violation of the Texas Rules of Civil Procedure and reinstated the dismissal. *Humble Exploration Co. v. Browning*, 690 S.W.2d 321, 323 (Tex. App. 1985, writ ref'd) *(en banc)*. (App. A at 1a & 4a, see A.5.) The appellants, including Flojo, unsuccessfully sought review of their appeal by the Supreme Court of Texas. (App. A at 1a & 4a, see A.6 & 7.) The appellants, including Flojo, then filed a petition for writ of certiorari with this Court in Cause No. 85-1182. This Court denied certiorari and a subsequent motion for rehearing. *Humble Exploration Co. v. Browning*, 475 U.S. 1065, 106 S.Ct. 1376, 89 L.Ed.2d 602, *reh'g denied*, 475 U.S. 1151, 106 S.Ct. 1807, 90 L.Ed.2d 351 (1986.) (App. A at 1a & 4a, see A.8 & 9.) At no point in those appeals did Flojo argue that it should be treated differently than the other appellants for the purposes of the dismissal.

Meanwhile, following a remand from *Browning v. Navarro I*, the federal district court rejected Holloway's and Navarro's further attacks on the 1982 Judgment and granted the Brownings immediate possession of the constructive trust property.[4] (App. A at 2a & 4a, see D.4.)

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[4] Flojo was not a named party in *Browning v. Navarro*. Aside from its affect on the appeal of the 1979 Case and prompting the *Jaehne v. Starnes* case, that case is not directly pertinent to Flojo. Ultimately the Brownings obtained judgments against Holloway and Robbie in *Browning v. Navarro*. *See Browning v. Navarro*, 923 F.2d 377 (5th Cir. 1991). The *Browning v. Navarro* judgment

Attempting to prevent compliance, Holloway (without Navarro's approval), Flojo and other cohorts filed *Jaehne v. Starnes*, another collateral attack on the 1982 Judgment, in the district courts of Lee County, Texas. (App. A at 2a & 4a, see H.1; *Jaehne v. Starnes* is identified on the flow chart by the letter "H"; App. D at 17a.) Holloway obtained an *ex parte* temporary restraining order and multiple extensions prohibiting compliance with the federal district court's orders in *Browning v. Navarro*. On August 28, 1985 the local Lee County judge, who had issued the serial temporary restraining orders for Holloway, signed an order which held the 1982 Judgment void for a litany of alleged reasons. (App. A at 2a & 4a, see H.2.)

On the same day the Texas Supreme Court stayed the order in an original mandamus proceeding, *Browning v. Placke* (which is identified on the flow chart by the letter "I"; App. A at 3a & 4a, I.1). Flojo, Holloway and other plaintiffs in *Jaehne v. Starnes* filed six briefs in support of Judge Placke's order. Flojo's key argument was that the 1982 Judgment was void as to it because the judgment granted an award against Flojo even though Flojo had not been named as a party or served in the 1979 Case. Flojo further argued that because the 1982 Judgment was void as to it, it was also void as to Holloway. The Texas Supreme Court rejected all their arguments, held that the record did not show that the 1982 Judgment was void,

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enjoins Holloway, Robbie and those acting in concert with them from initiating or pursuing any future proceeding of any kind in the courts of the United States alleging the invalidity of the 1982 Judgment.

and issued a conditional writ of mandamus. *Browning v. Placke*, 698 S.W.2d 362, 363 (Tex. 1985). (App. A at 3a & 4a, see I.2.)

Shortly following this Court's denial of the motion for rehearing in the direct appeal from the 1979 Case, and a number of decisions adverse to Holloway in *Browning v. Navarro* and *Holloway v. Walker*, Holloway incorporated his prior allegations and added new ones in three new, virtually identical attacks on the 1982 Judgment. The first attack was in *Browning v. Navarro* (App. A at 2a & 4a, see D.5), the second was in the bankruptcy court (App. A at 1a & 4a, see B.3), and the third, virtually identical attack, was the filing of this case. (App. A at 3a & 4a, see J.1; *Holloway v. Starnes* is identified on the flow chart by the letter "J.") Holloway filed this suit on behalf of Flojo, Humble, Sterling, Robbie and himself.

In this case, Holloway filed twelve motions for partial summary judgment. In his first motion for summary judgment Holloway alleged that Judge Walker had been disqualified by the Texas Constitution by virtue of (1) his interest; (2) his acts as counsel in the case; and (3) his bias, amounting to denial of due process under the Texas constitution. In his Amended Third Motion for Summary Judgment, Holloway contended that the courts should set aside the 1982 Judgment as void because it purported to impose joint and several liability on Flojo and him, even though Flojo had not been named as a defendant in the 1979 Case, had not been served with process, and had not appeared. (App. B at 5a.) In his Sixth Motion for Partial Summary Judgment, Holloway asserted that Judge Walker had acted as counsel for the Brownings and therefore had been disqualified. Flojo did not join in those

motions, did not ever adopt any of Holloway's twelve motions for summary judgment, and did not file any motion for summary judgment itself. (App. B at 6a; App. C at 13a-16a.)

The Brownings moved for summary judgment. With respect to the claims of Flojo, the Brownings contended that they were entitled to summary judgment on the grounds of: (1) Flojo's unsuccessful appeal from the 1982 Judgment; (2) Flojo's preclusion under *res judicata* by the decision in *Browning v. Placke*; and (3) Flojo's being barred from attacking the 1982 Judgment because its Texas corporate charter had been forfeited for non-payment of franchise taxes. Flojo filed no response to the Brownings' original or amended motions for summary judgment. The 162nd Judicial District Court granted the Brownings' motion for summary judgment without specifying the specific reasons for its judgment. (App. A at 3a & 4a, see J.5.)

In its appeal to the Texas court of appeals, Flojo only assigned as error the district court's granting the Brownings' motion for summary judgment "based on *res judicata* because Flojo was not a party either to the original Browning judgment sought to be vacated herein or to any subsequent case which could possibly bar this bill of review." Flojo's other assignments of error contended that the district court erred by denying Holloway's Amended Third Motion for Summary Judgment, First Motion for Summary Judgment, and Sixth Motion for Partial Summary Judgment.

The Texas court of appeals affirmed the summary judgment against Flojo because the summary judgment

may have been granted on a ground that was not challenged by Flojo in the appeal. *Holloway v. Starnes*, 840 S.W.2d 14, 23 (Tex. App. 1992, writ denied). (App. A at 3a & 4a, see J.6.) In its motion for rehearing to the court of appeals, Flojo adopted the motions for rehearing of Holloway and Robbie, but asserted no points of error of its own. Neither Holloway nor Robbie assigned error to the court of appeals' ruling on Flojo in their motions for rehearing. In its application for writ of error to the Supreme Court of Texas, Flojo did not assign a point of error, or otherwise address the grounds for the court of appeals' affirmance of the summary judgment against it.

In its application for writ of error to the Texas Supreme Court, Flojo argued for the first time that the trial court's judgment against in this case could not stand because the Brownings had not obtained service on it. The Supreme Court of Texas denied writ of error and subsequently denied Flojo's motion for rehearing. (App. A at 3a & 4a, see J.7 & 8.)

Concurrent with these developments in the case below, the Lee County district court granted the Brownings a summary judgment against Flojo in *Jaehne v. Starnes* on April 3, 1991. (App. A at 3a & 4a, see H.7 & 8, App. E at 26a.) Another Texas court of appeals affirmed that summary judgment on July 1, 1992. (App. A at 3a and 4a, see H.10, App. F at 30a, App. G at 32a.) Flojo did not appeal from that appellate court's judgment.

REASONS FOR DENYING THE WRIT

I. Flojo Did Not Preserve in the Trial Court The Issues it Seeks to Present Here.

The issues that Flojo seeks to present here were alleged in the plaintiffs' petition which Holloway filed on Flojo's behalf (which Flojo now attempts to disclaim) and were urged by Holloway in three of his 12 motions for summary judgment. Flojo, however, did not join or adopt Holloway's motions for summary judgment, nor move for summary judgment on these or any other issues. (App. B at 6a, App. C at 13a-16a.) Under Texas case law, an appellate court cannot grant a summary judgment for a party who has not moved for summary judgment. *Teer v. Duddlesten*, 664 S.W.2d 702, 703 (Tex. 1984); *San Jacinto River Auth. v. Duke*, 783 S.W.2d 209, 210 (Tex. 1990). While addressing the Holloways' assignments of error concerning the Third Motion for Summary Judgment, the court of appeals specifically held that Flojo could not rely on that motion for reversal on appeal because it did not adopt the motion. 840 S.W.2d at 24.

Rule 14.1(h) of this Court's rules provides:

> If review of a judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings, both in the court of first instance and in the appellate courts, at which the federal question[s] sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by those courts; and such pertinent quotation of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter

> appears (e.g., ruling on exception, portion of court's charge and exception thereto, assignment of errors) ***as will show that the federal question was timely and properly raised so as to give this Court jurisdiction*** to review the judgment on a writ of certiorari. . . .

(Emphasis added.) Flojo failed to timely and properly raise in the court of first instance the questions it seeks to present in the court of first instance so as to give this Court jurisdiction.

II. There Are Multiple Adequate, Independent, Non-Federal Grounds to Support the Judgment.

It is a settled rule of this Court that where the judgment of a state court rests on two grounds, one of which is non-federal in character, this Court's jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment. *Board of Supervisors v. Allman*, 423 U.S. at 940, 96 S.Ct. at 300, 46 L.Ed2d at 272; *Fox Film Corp. v. Muller*, 296 U.S. 207, 210, 56 S.Ct. 183, 184, 80 L.Ed. 158 (1935).

A. The Trial Court Had Three Independent Non-Federal Grounds for Granting Summary Judgment.

The various grounds for the Brownings' motion for summary judgment against Flojo included: (1) Flojo's unsuccessful appeal of the 1982 judgment; (2) Flojo's preclusion under *res judicata* by *Browning v. Placke*; and (3) Flojo's being barred from attacking the 1982 Judgment

because its charter had been forfeited for non-payment of franchise taxes.

Flojo was an appellant in the direct appeal from the 1982 Judgment. The court of appeals dismissed that appeal after finding that the appellants had abused the Texas judicial system. *Humble Exploration Co. v. Browning*, 677 S.W.2d at 114. Under Texas law, a bill of review is not an alternative remedy to a direct appeal. A direct appeal would have provided adequate relief to Flojo. Therefore, it had to allege and prove that it was unable to obtain relief in a direct appeal because (1) it was prevented from doing so by the fraud, accident or wrongful act of the opposite party, *French v. Brown*, 424 S.W.2d 893, 895 (Tex. 1967); and (2) its inability to have the case resolved on appeal was unmixed by any fault or negligence of its own. *Petro-Chemical Transport, Inc. v. Carroll*, 514 S.W.2d 240, 246 (Tex. 1974). Flojo now contends that the court of appeals erred in dismissing its appeal in the 1972 Case because it had not been a party to the Holloway's abuse of the judicial system. Flojo should have made this argument in the original appeal. Its failure to do so was its own fault.

Flojo, along with Holloway and other cohorts, also collaterally attacked the 1982 Judgment as void in *Jaehne v. Starnes*, for these same reasons it asserts here. (App. D at 19a-23a.) In *Jaehne v. Starnes*, Judge Placke issued an order holding the 1982 Judgment void for numerous reasons, including the fact that the 1982 Judgment was awarded against Flojo which had not been a named party to the 1979 Case. The Brownings attacked Judge Placke's order in *Browning v. Placke*, a mandamus proceeding

before the Texas Supreme Court. Flojo filed two responsive briefs with the Texas Supreme Court in which it argued that the 1982 Judgment was void because it was imposed on Flojo, which was not a party to the 1979 Case. The Texas Supreme Court issued its mandamus to vacate Judge Placke's order because the record, including the Flojo claim, did not show that the 1982 Judgment was void. *Browning v. Placke*, 698 S.W.2d at 363. Thus, Texas law of *res judicata* would bar Flojo's relitigating its contention that the 1982 Judgment was void.

The summary judgment record also included a certificate from the Texas Secretary of State showing that Flojo's tax identification number had been forfeited on September 19, 1982 and its charter had been forfeited on February 20, 1982, over a year prior to the Brownings' obtaining from the federal courts their first enforcement order for the 1982 Judgment. Section 171.252 of the Texas Tax Code prohibits a corporation which has its corporate privileges forfeited from suing or defending in a court of Texas.[5]

This prohibition is a proper and broad exercise of the Legislature's authority. *Federal Crude Oil Co. v. Yount-Lee Oil Co.*, 122 Tex. 21, 52 S.W.2d 56, 59-60 (1932). Therefore, Flojo was prohibited from attacking the 1982 Judgment in the courts of Texas while its charter was forfeited.

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[5] If the corporate privileges of a corporation are forfeited under this subchapter:

(1) the corporation shall be denied the right to sue or defend in a court of this state; . . . .

Tex. Tax Code Ann. § 171.252 (1992).

B. The Court of Appeals Had an Additional Independent State Ground for Affirming the Judgment Against Flojo.

Texas trial courts are not required to identify the specific grounds upon which they might grant a summary judgment. An appellant attacking a summary judgment in Texas must therefore attack each of the several grounds asserted in a motion for summary judgment on which the trial court could have based a summary judgment. *Malooly Brothers, Inc. v. Napier*, 461 S.W.2d 119, 121 (Tex. 1970). An appellant may do that by either a general point of error attacking the grant of the motion for summary judgment or separate points of error attacking each of the several grounds asserted in the motion for summary judgment. *Id.* If there is not a general assignment that the trial court erred in granting summary judgment and there is a ground not specifically challenged by the appellant, the summary judgment must stand. *Id.* The court of appeals affirmed the judgment against Flojo under this rule of Texas appellate procedure because Flojo failed to properly urge on appeal that the trial court had erred in granting summary judgment on the ground that the forfeiture of its corporate charter barred its attack on the 1982 Judgment. *Holloway v. Starnes*, 840 S.W.2d at 23.

C. The Texas Supreme Court's Denial of Writ of Error Is Supported by an Independent State Ground.

In Texas when the judgment of a court of appeals rests upon more than one ruling by it, the party

aggrieved by the judgment must assign error to each ruling or risk having the judgment affirmed on the ruling to which no error has been assigned. In such situations, the petitioner waives his right to complain of the ruling to which no error was assigned. *City of Deer Park v. State*, 154 Tex. 174, 275 S.W.2d 77, 84 (1955). In this case Flojo made no assignment of error in its petition to the Texas Supreme Court regarding the basis upon which the court of appeals affirmed the judgment against it. It therefore waived any complaint about that ruling and the judgment would have to be affirmed on that basis.

At each level of the state courts in this case, there have been separate state grounds, independent of the federal issues sought to be presented by Flojo here, which support the Brownings' judgment against it. Flojo has failed to establish the jurisdiction necessary for this Court's review of the decision below by certiorari.

III. Reversal of This Suit as to Flojo Would Not Provide Any Practical Benefits to Flojo.

Flojo attempts to evade the judgments of the Texas courts below by now contending that those courts had no personal jurisdiction over it. Flojo raised this argument for the first time in the Texas Supreme Court. Holloway filed this suit individually and on behalf of Flojo, Robbie, Humble and Sterling. Holloway, who is an attorney admitted to practice before the courts of Texas, as well as the federal district courts in the Northern District of Texas and the Fifth Circuit, identified himself as "attorney *pro se*." Flojo now suggests that Holloway had no

authority to represent it. It apparently contends that Holloway had to have service issued on it as well as the defendant Brownings in order for the Texas courts to obtain personal jurisdiction over it. At the same time that Holloway filed this suit on behalf of Flojo in this case, he was a co-party and acting as attorney for Flojo in *Jaehne v. Starnes*, where Holloway had asserted many of the same contentions on behalf of Flojo. There is nothing in the appellate record to indicate that Holloway did not have authority to act on behalf of Flojo in this case.

Moreover, before the appellate courts below and this Court, Flojo has sought not merely to avoid application of the Brownings' judgment against it, but rather an affirmative judgment for both itself and the Holloways.[6] In seeking relief for itself and the Holloways, it has to rely on both the pleadings and motions for summary judgment filed by Holloway. A party who seeks affirmative relief from a court is estopped under Texas law to claim that

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[6] Even if Flojo had been permitted to attack the 1982 Judgment in this appeal on the grounds that the trial court had no personal jurisdiction over Flojo in the 1979 Case, this would not benefit Holloway. The 1982 Judgment was joint and several. In such cases, a reviewing court may affirm a judgment against one defendant charged jointly and severally as a tortfeasor and reverse the judgment as to another defendant so charged. *Missouri, K. & T. Ry. Co. of Texas v. Enos*, 92 Tex. 577, 50 S.W. 928 (1899); *S.H. Kress & Co. v. Selph*, 250 S.W.2d 883, 896 (Tex. Civ. App. 1952, writ ref'd n.r.e.). In the 1982 Judgment, Flojo's liability was derivative of Holloway's liability. As the court of appeals held, although a reversal as to Holloway would require a reversal as to Flojo, the reverse was not true. *Holloway v. Starnes*, 840 S.W.2d at 24. The inclusion of Flojo in the 1982 Judgment, even if erroneous, would not require that the 1982 Judgment be set aside against the Holloways.

that court was or is without jurisdiction. *Hilburn v. Jennings*, 698 S.W.2d 99, 100 (Tex. 1985); *Spence v. State Nat'l Bank*, 5 S.W.2d 754, 756 (Tex. Comm'n App. 1928, judgm't adopted).

Furthermore, Flojo's various positions are internally inconsistent. In order to avoid the judgment in favor of the Brownings, it claims that Holloway had no authority to represent it in filing this suit. Simultaneously, it asks this Court to grant it affirmative relief holding the 1982 Judgment void based upon Holloway's pleadings and motions for summary judgment. Flojo cannot have it both ways.

Even if Holloway had no authority to bring this suit on behalf of Flojo, that circumstance would not assist Flojo in obtaining affirmative relief at this time. The most Flojo would be entitled to would be a holding that it is not a party to this suit and setting aside the judgment as to it.

The statute of limitations for a bill of review in Texas is four years. *Levy v. Roper*, 256 S.W. 251, 253-54 (Tex. 1923); *Steward v. Steward*, 734 S.W.2d 432, 434 (Tex. App. 1987, no writ). The 1982 Judgment, as amended, attacked in this suit was signed on November 11, 1982. Flojo knew that the trial court had granted the judgment against it in 1982 because it appealed that judgment. Therefore, Flojo had to file any bill of review prior to November 11, 1986. It cannot now claim both that Holloway had no authority to file this suit on its behalf, and at the same time use Holloway's filing to meet the statute of limitations. Thus, even if the judgment against Flojo were reversed in this case, Flojo would gain nothing. Any new bill of review

for Flojo is now time-barred for more than six years under Texas law.

In addition, *Jaehne v. Starnes*, under the doctrine of *res judicata* now bars any new attack by Flojo on the 1982 Judgment. In its petition for certiorari, Flojo stated that it preferred litigating its claims against the Brownings in *Jaehne v. Starnes* instead of this case. In that suit, Flojo and the Jaehnes collaterally attacked the 1982 Judgment on the grounds that they were not personally subject to the jurisdiction of the trial court in the 1979 Case. (App. D at 19a-23a.) The Lee County court granted the Brownings a summary judgment against Flojo and the Jaehnes in April, 1991. That judgment provides in part:

> IT IS FURTHER ORDERED, ADJUDGED and DECREED that Bennie C. Jaehne, Herman Jaehne, and *Flojo* Trading Corporation ***take nothing on any of their claims attacking the validity or enforceability of the Browning v. Holloway Judgment*** and all other claims against the Browning Interests, their agents, employees, attorneys or servants for conduct involved in the litigation of that cause of action, including any past or current enforcement efforts instituted by the Browning Interest (sic) in aid of the *Browning v. Holloway* Judgment. All such claims are hereby dismissed with prejudice.

(App. E at 28a, emphasis added.)

The Austin Court of Appeals affirmed that judgment on July 1, 1992. (App. F and G at 30a & 32a.) That opinion

shows that the Brownings had six grounds for summary judgment, only one of which was *res judicata* as a result of this case. (App. G at 36a-37a.) The Austin Court of Appeals affirmed the *Jaehne v. Starnes* judgment because the appellants (just like Flojo here) failed to make either a general assignment of error or attack all the possible grounds for the trial court's judgment. Therefore, the *Jaehne v. Starnes* judgment is now *res judicata* to any future attacks Flojo might make on the 1982 Judgment as void for any reason. *Barr v. Resolution Trust Corp.*, 837 S.W.2d 626, 630-31 (Tex. 1992).

IV. The Decisions of the Courts Here Are In No Way Contrary to *Peralta*.

Peralta v. Heights Medical Center, Inc. involved a defendant who had a default judgment taken against him in the absence of any valid service of process or notice of judgment. 485 U.S. 80, 108 S.Ct. 896, 99 L.Ed.2d 75 (1988). The Texas courts denied a bill of review in that case because Peralta could not show that he had a meritorious defense to the original suit. This Court held that the due process clause of the Fourteenth Amendment required the granting of the bill of review so that the defendant would be in the same position he occupied had he received due process in the first place. 485 U.S. at 900, 108 S.Ct. at 900.

For the various reasons explained previously, including Flojo's failure to ever move for a summary judgment on this basis, the courts below never reached Flojo's *Peralta* argument. Therefore, they have made no rulings that are contrary to *Peralta*. Moreover, the situation in the

1979 Case was not the same as *Peralta*. The Brownings had alleged specifically that Holloway set up and acted through corporations which were his alter egos. The jury found as a matter of fact and the trial court held as a matter of law under the evidence presented in the original case, that Flojo was one of the alter egos of Holloway. It is on that basis that Flojo was included in the 1982 Judgment.

Under Texas law, Flojo was not a separate legal entity from Holloway. *Matthews Constr. Co., Inc. v. Rosen*, 796 S.W.2d 692, 694 (Tex. 1990). As such, it had been served, and participated in the trial through Holloway. As Holloway's alter ego, Flojo was liable for Holloway's actions, and its corporate property was subject to execution to satisfy a judgment against him. *Matthews Constr. Co., Inc. v. Rosen*, 796 S.W.2d at 693; *American Petroleum Exchange, Inc. v. Lord*, 399 S.W.2d 213 (Tex. Civ. App. 1966, writ ref'd n.r.e.). There was no violation of Flojo's right to due process.

CONCLUSION

Throughout this litigation, Flojo has acted as a Trojan horse for Holloway. This tactic is nowhere more evident than in its appeal, where Flojo eschewed assignments of error relevant to the decisions adverse to it in favor of assignments of error designed to support the Holloways. Even in this Court, Flojo ignores the grounds upon which the Texas courts ruled against it and asserts claims raised in the trial court not by it but by the Holloways. Flojo

presents no federal issues that it raised and preserved in the state courts for this Court to review.

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A

CHART OF BROWNING v. HOLLOWAY LITIGATION

LEGEND

A. Browning v. Holloway

1. Filed 9/12/79
2. Judgment 8/26/82
3. Appeal 11/24/82
4. App. Dism'd 7/11/84
5. Dism'l reinstated 3/26/85
6. NRE 7/3/85
7. Reh'g Den. 10/30/85
8. Cert. Den. 3/10/86
9. Reh'g Den. 4/28/86

B. Holloway Bankruptcy

1. Filed 11/19/79
2. Conv. to Chap. 7 10/1/82
3. PSH Objections 5/23/86
4. Bank. Ct. O/R PSH Objections 8/7/86
5. PSH Appeal 8/13/86
6. Stayed Pending BvN 8/29/88
7. Dist. Ct. Affirms 4/19/91
8. 5th Cir. Affirms 1/8/92
9. 5th Cir. Rev. Op. 1/27/92

C. Holloway v. Walker

1. Filed 11/18/82
2. Judgment 4/23/85
3. Emerg. Appl. 1/7/86
4. Emerg. Appl. Den. 3/17/86
5. 5th Cir. Affirms 3/19/86
6. Reh'g Den. 5/30/86

7. Cert. Den. 12/1/86
8. Sanctions 1/27/87

D. Browning v. Navarro

1. Filed 3/2/83
2. Judgment 1/17/84
3. BvN I 10/1/84
4. Part. Jdgmt 4/2/85
5. PSH MSJ & DJ 5/5/86
6. Judgment 5/23/86
7. BvN II 8/26/86
8. BvN III 10/23/89
9. 5th Cir. Reh'g Den. 1/26/90
10. Jdgmt w/Inj. 3/21/90
11. BvN IV 1/30/91

E. In Re: Holloway

1. Filed 3/14/86
2. Denied 3/17/86

F. Gregory v. Walker

1. Filed 5/25/84
2. Dismissed 7/12/85

G. Navarro v. Starnes

1. Filed 6/17/85
2. Judgment 12/9/91

H. Jaehne v. Starnes

1. Filed 6/17/85
2. Order 8/28/85
3. Vacated 10/31/85
4. Dismissed 1/10/86
5. Ct. App. Op. 9/23/87

6. Writ Denied 5/11/80
7. Part. Jdgmt & Sev. 4/3/91
8. Am'd Par. Jdgmt & Sev. 4/18/91
9. Jdgmt. (sev. case) 1/6/92
10. Ct. App. Af'm 7/1/92

I. Browning v. Placke

1. Leave to File & Stay 8/28/85
2. Mandamus 10/30/85

J. Holloway v. Starnes

1. Filed 6/16/86
2. Ryan Jdgmt 4/13/88
3. Ct. App. Op. 8/15/89
4. Writ Den. 2/28/90
5. Judgment 1/10/91
6. Ct. App. Af'm 6/30/92
7. Writ Denied 2/10/93
8. Reh'g Den. 3/24/93
9. Pet. for Cert. 6/22/93

OVERSIZE FOLDOUT(S) FOUND HERE IN THE PRINTED EDITION OF THIS VOLUME ARE FOUND FOLLOWING THE LAST PAGE OF TEXT IN THIS MICROFICHE EDITION.

SEE FOLDOUT NO 1

APPENDIX B

NO. 86-7704-I
NO. 89-6582-I
NO. 89-10016-I

PAT S. HOLLOWAY, and BRENDA HOLLOWAY, Individually, HUMBLE EXPLORATION COMPANY, INC., STERLING PIPELINE COMPANY, FLOJO TRADING CORPORATION and ROBBIE HOLLOWAY,	§	IN THE DISTRICT COURT OF
Plaintiffs,	§	
v.	§	
MICHAEL G. STARNES, Individually, and as Co-Independent Executor and Co-Trustee of the ESTATE OF WILLIAM W. BROWNING, JR., Deceased, and as Trustee of the BROWNING CHILDRENS' TRUST and as Special Trustee; JANE H. BROWNING, Individually and as Co-Independent Executrix and Co-Trustee of the ESTATE OF WILLIAM W. BROWNING, JR., Deceased; INTERFIRST BANK DALLAS, N.A., Individually and as Co-Trustee of the ESTATE OF WILLIAM W. BROWNING, JR., Deceased; CATHERINE AGNES LAND STARNES; KATHRYN LOUISE BROWNING COOK;	§	DALLAS COUNTY, TEXAS
	§	162ND JUDICIAL DISTRICT

AVERILLE ADAMS BROWNING; §
WILLIAM WEBB BROWNING §
III; ROBERT HOLLAND §
BROWNING; WINFRED §
FALLON BROWNING VAUGHN; §
R. JACK AYRES, JR., §
Individually and LAW OFFICES §
OF R. JACK AYRES, JR., P.C., §
a corporation, §
§
Defendants.

PLAINTIFFS' AMENDED THIRD MOTION FOR SUMMARY JUDGMENT AND BRIEF IN SUPPORT THEREOF

TO THE HONORABLE JUDGE OF SAID COURT:

Now come Plaintiffs Pat S. Holloway and Brenda Holloway with this their Amended Third Motion for Summary Judgment and Brief in Support thereof, by which they would show the Court as follows:

I.

The Amended Judgment of November 11, 1982, in Cause No. 79-9623-I in the 162nd Judicial District Court of Dallas, Texas, styled *Jane H. Browning, et al. v. Pat S. Holloway, et al.*, purports to impose a constructive trust upon 100% of the issued and outstanding shares of stock of Flojo Trading Corporation, purports to impose a constructive trust upon and award legal and equitable title to all property and mineral interests owned, controlled, or held by Flojo Trading Corporation, purports to impose a constructive trust upon all property, assets, and other things of value owned, controlled, held or claimed by Flojo Trading Corporation, and further purports to

impose joint and several liability upon Flojo Trading Corporation for damages in the amount of SEVENTY MILLION DOLLARS ($70,000,000.00).

II.

Flojo Trading Corporation was not named as a defendant, was not served with citation or other process, and did not appear in any fashion at any time prior to entry of judgment in Cause No. 79-9623-I in the 162nd Judicial District court (sic) of Dallas County, Texas. Said judgment in Cause No. 79-8623-I (sic) does not recite that Flojo Trading Corporation was a defendant in that cause.

III.

The legal and beneficial stockholders of Flojo Trading Corporation were not named as defendants, were not served with citation or other process, and did not appear in any fashion at any time prior to entry of judgment in Cause No. 79-9623-I in the 162nd Judicial District Court of Dallas County, Texas. Said judgment in Cause No. 79-9623-I does not recite that any of the legal and beneficial stockholders of Flojo Trading Corporation were defendants in that cause.

IV.

The judgment in Cause No. 79-9623-I is therefore void as to Flojo Trading Corporation. Insofar as the judgment imposes joint liability and is indivisible, it is also void as to the defendants in Cause No. 79-9623-I, specifically Plaintiff in this cause Pat S. Holloway.

V.

In support of this motion, and pursuant to Rule 201 of the Texas Rules of Civil Evidence, Plaintiffs request that the Court take judicial notice of the Court's file in Cause No. 79-9623-I, styled *Jane H. Browning, et al. v. Pat S. Holloway, et al.* Plaintiffs further adopt and incorporate herein by reference the affidavit of Joe W. Holt which was previously attached to and incorporated in Plaintiffs' Third Motion for Partial Summary Judgment and Brief in this cause. A copy of said affidavit of Joe W. Holt is attached hereto as Appendix 1.

VI.

In further support of this motion, Plaintiffs submit the following authorities.

In a direct attack on a judgment, such as the Bill of Review brought in this cause, no presumptions are indulged in support of the judgment's validity. *Fender v. Moss,* 696 S.W.2d 410 (Tex. App.-Dallas 1985). As disclosed by the summary judgment evidence, namely the Court's file in Cause No. 79-9623-I and the affidavit of Joe W. Holt, Flojo Trading Corporation was never made a party, either by citation or appearance, to Cause No. 79-9623-I prior to entry of the Amended Judgment dated November 11, 1982. The judgment against Flojo Trading Corporation is therefore void. See *Peralta v. Heights Medical Center,* 485 U.S. 80, 108 S.Ct. 896 (1988).

The Supreme Court of Texas held over a century ago that if a judgment is void as against one defendant and is indivisible in nature, then it is necessarily void as against

other defendants named in the judgment. *Hulme v. Janes, Adm'r*, 6 Tex. 242, 55 Am. Dec. 774 (1851). That holding was followed in *Long v. Garnett*, 45 Tex. 400 (1876), as it has been consistently followed in the years since. See, e.g. *McLaren Rubber Co. v. Williams Auto Supply*, 81 S.W.2d 255 (Tex. Civ. App. – Eastland 1934).

The rationale, as applicable here, for such a holding is that a judgment of joint liability cannot be rendered in the absence of any party sought to be held liable. *Zodiac Corporation v. General Electric Credit Corporation*, 566 S.W.2d 341, 346 (Tex. Civ. App.-Tyler 1978). Put another way, if a trial court has not acquired jurisdiction over all of the parties affected by its judgment, then the judgment is void. *Danner v. Aetna Life Insurance Co.*, 496 S.W.2d 950 (Tex. Civ. App.-Ft. Worth 1973).

The judgment in Cause No. 79-9623-I as to joint and several liability for the $70,000,000.00 damage award is necessarily indivisible as to Flojo Trading Corporation and the other named defendants, including Pat S. Holloway. Since that judgment is void as to Flojo Trading Corporation, it is also necessarily void as to the other named defendants, including Pat S. Holloway. Likewise, the imposition of a constructive trust over the property, mineral interests, and other assets of the defendants, including Flojo Trading Corporation, is necessarily indivisible and therefore void as to all defendants in that cause, including Pat S. Holloway.

PREMISES CONSIDERED, Plaintiffs respectfully pray the Court enter judgment that the Amended Judgment of November 11, 1982 in Cause No. 79-9623-I in the

162nd Judicial District Court of Dallas County, Texas, is void.

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFFS
PAT S. HOLLOWAY AND
BRENDA HOLLOWAY

APPENDIX C

(Seal)

TRANSCRIPT

NO. 86-07704-I

VOLUME I

In the District Court, 162nd Judicial District Court of Texas , begun and holden within and for the County of Dallas and the State of Texas before the Honorable Judge thereof presiding.

PAT S. HOLLOWAY, ET AL — PLAINTIFF

VS.

MICHAEL G. STARNES, ET AL — DEFENDANT

APPEALED TO THE COURT OF APPEALS
FOR THE FIFTH SUPREME JUDICIAL DISTRICT
OF TEXAS, AT DALLAS.

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APPEAL BONDS FILED: APRIL 5, 1991
APRIL 5, 1991
APRIL 10, 1991

NO. 86-7704-I

PAT HOLLOWAY, ET AL	()	IN THE 162ND JUDICIAL
	()	DISTRICT COURT OF
VS.	()	
MICHAEL STARNES, ET AL	()	DALLAS COUNTY, TEXAS

* * *

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APPENDIX D

BENNIE C. JAEHNE; HERMAN JAEHNE; TED R. FERGUSON; JOE W. HOLT; FLOJO TRADING CORPORATION; MARCY HOLLOWAY; CATHERINE GAIL HOLLOWAY; PATRICK LEE HOLLOWAY; BRENDA HOLLOWAY; PAT S. HOLLOWAY as Trustee of CATHERINE GAIL HOLLOWAY; PAT S. HOLLOWAY as Trustee of PATRICK LEE HOLLOWAY; PAT S. HOLLOWAY; DON NAVARRO, as Trustee of PAT S. HOLLOWAY, HUMBLE EXPLORATION COMPANY, INC. (Now HECI Exploration Company) and STERLING PIPELINE COMPANY	)	IN THE DISTRICT COURT OF
Plaintiffs,	)	
v.	)	
MICHAEL G. STARNES, Individually and as Co-Independent Executor of the Estate of William W. Browning, Jr., Deceased, and as Trustee for the BROWNING CHILDRENS' TRUSTS; JANE H. BROWNING, Individually and as Co-Independent Executrix and as Co-Trustee of the Estate of WILLIAM W. BROWNING, JR., Deceased; G.H. KELSOE, JR., and R. JACK AYRES, JR., Individually and as a professional corporation; CATHERINE AGNES LAND	)	LEE COUNTY, TEXAS

STARNES; KATHRYN LOUISE BROWNING COOK; AVERILLE ADAMS BROWNING; WILLIAM WEBB BROWNING III; ROBERT HOLLAND BROWNING; and WINIFRED FALLON BROWNING; DEE BROWN WALKER; JOHN WRIGHT; WHITLEY R. SESSIONS; J.R. HURT; ERIC MILLER, and SOUTHWEST MEDIA CORPORATION Defendants.	)	21st JUDICIAL DISTRICT (Filed June 17, 1985)

PLAINTIFFS' ORIGINAL PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW BENNIE C. JAEHNE, HERMAN JAEHNE, TED R. FERGUSON, JOE W. HOLT, FLOJO TRADING CORPORATION, MARCY HOLLOWAY, CATHERINE GAIL HOLLOWAY, PATRICK LEE HOLLOWAY, BRENDA HOLLOWAY, PAT S. HOLLOWAY as Trustee of CATHERINE GAIL HOLLOWAY, PAT S. HOLLOWAY as Trustee of PATRICK LEE HOLLOWAY, PAT S. HOLLOWAY (hereinafter "Holloway"), DON NAVARRO, as Trustee of PAT S. HOLLOWAY (hereinafter called the "Trustee"), HUMBLE EXPLORATION COMPANY, INC. (now HECI Exploration Company but hereinafter called "Humble") and STERLING PIPELINE COMPANY (hereinafter "Sterling") Plaintiffs, in the above entitled and numbered cause, and make and file this their Original Petition, complaining of Defendants MICHAEL G. STARNES, Individually and as Co-Independent Executor of the Estate of William W. Browning, Jr., Deceased, and as Trustee for the BROWNING CHILDREN'S TRUSTS;

JANE H. BROWNING, Individually and as Co-Independent Executrix and as Co-Trustee of the Estate of William W. Browning, Jr., Deceased; G.H. KELSOE, JR., and R. JACK AYRES, JR., Individually and as a professional corporation; CATHERINE AGNES LAND STARNES; KATHRYN LOUISE BROWNING COOK, AVERILLE ADAMS BROWNING, WILLIAM WEBB BROWNING, III, ROBERT HOLLAND BROWNING, and WINIFRED FALLON BROWNING, Individually (the foregoing Defendants being hereinafter called the "Browning Interests"); DEE BROWN WALKER, JOHN WRIGHT; WHITLEY R. SESSIONS; J. R. HURT; ERIC MILLER and SOUTHWEST MEDIA CORPORATION ("Defendants") and in support thereof would respectfully show the Court as follows:

* * *

IV

Summary of the Suit

* * *

Count Fourteen

In Count Fourteen Bennie C. Jaehne, Herman Jaehne and Joe Holt, as majority shareholders of Flojo, and Flojo itself, seek a declaratory judgment that the Void Judgment is void as to them and to recover damages from the Browning Interests. The Void Judgment purports to impose a constructive trust in favor of the Browning Interests on all the stock *and* all of the assets of Flojo, on the grounds that such corporation was the alter ego of Holloway. These plaintiffs are the actual legal and beneficial owners of their stock in Flojo, and it was the actual

legal and beneficial owner of its assets. Neither Bennie C. Jaehne nor Herman Jaehne nor Joe W. Holt nor Flojo were served with process in, or named as defendants in, or in any other way made parties to, the proceedings which resulted in the Void Judgment, which is therefore void as to them.

Count Fifteen

In Count Fifteen all Plaintiffs seek a declaratory judgment that the Void Judgment is a void judgment and, that the underlying claims of the Browning Interests are without merit as to any of Plaintiffs. Certain Plaintiffs also seek herein ancillary injunctive relief.

V.

GROUNDS FOR RELIEF

1. The following Plaintiffs were never served with process, named as defendants, or in any other way made parties in the Dallas County lawsuit which resulted in the Void Judgment:

Bennie C. Jaehne
Herman Jaehne
Joe W. Holt
Flojo Trading Corporation
Ted R. Ferguson
Brenda Holloway
Marcy Holloway
Catherine Gail Holloway
Patrick Lee Holloway
Pat S. Holloway, Trustee for Catherine Gail Holloway

Pat S. Holloway Trustee for Patrick Lee Holloway

None of the foregoing Plaintiffs except Flojo Trading Corporation was even named in the Void Judgment. Therefore, the Void Judgment is void as to them upon such grounds, in addition to the other grounds for relief set forth below.

* * *

XIX

Count Fourteen

Claim by Flojo Trading Corporation and Its Majority Shareholders to Quiet and Remove Encumbrance from Titles, for Declaratory Judgment, and for Damages

1. Flojo and its majority shareholders, Bennie Jaehne, Herman Jaehne, and Joe W. Holt, respectfully show to the Court that none of them was named as a defendant in any petition brought by the Browning Interests against Humble, Holloway, *et al*, in the proceedings which resulted in the Void Judgment, and none of such Plaintiffs was served with process in, or otherwise made a party to, the proceedings which resulted in the Void Judgment; nor did any of such Plaintiffs file an answer or otherwise voluntarily appear in the 1979 Case or the 1982 Case. Notwithstanding, the Void Judgment purports to impose a constructive trust upon all of the assets and all of the stock on Flojo.

2. Flojo seeks hereby to quiet the title to all of its assets as against the claims of the Browning Interests based on the Void Judgment and to remove the

encumbrance of the Void Judgment from such titles. Plaintiffs Bennie Jaehne, Herman Jaehne, and Joe W. Holt seek hereby to quiet the title to their stock of Flojo as against the claims of the Browning Interests based on the Void Judgment.

3. These plaintiffs assert that the Void Judgment is void upon the same grounds and by reason of the same facts that make such judgment void as to the other Plaintiffs as hereinabove set forth. In addition, however, these Plaintiffs assert that such judgment is void, invalid, and ineffective as to them because they were not parties thereto or to the legal proceedings which resulted in the Void Judgment and accordingly, they are not bound thereby in any way.

4. Plaintiffs seek hereby a declaratory judgment that the Void Judgment is void as to all parties or, in the alternative is void, invalid, and ineffective as to them. Plaintiffs further seek a declaratory judgment that no Defendant has any valid claim for damages against any of these Plaintiffs or any valid claim of title to any of the assets of any of these Plaintiffs.

5. These Plaintiffs further show to the Court that they have incurred various fees and expenses, and suffered various other damages, caused by Defendants arising out of the provisions of the Void Judgment, purportedly affecting them and their properties and out of the void proceedings that resulted in the Void Judgment and out of subsequent proceedings and actions resulting from the Void Judgment. These Plaintiffs seek recovery of all such damages from Defendants, together with their costs, expenses, and attorney's fees herein.

XX

Count Fifteen

Claims for Declaratory and Injunctive Relief

A. All Plaintiffs seek hereby, pursuant to Article 2524-1 of the Revised Civil Statutes of Texas, a declaratory judgment that the Void Judgment is void, a nullity, and unenforceable, and that Defendants have acquired no legal rights, powers, privileges or immunities thereunder. All Plaintiffs similiarly (sic) seek a declaratory judgment that the underlying claims of the Browning Interests are invalid and non-meritorious as to all Plaintiffs.

* * *

XXI

PRAYER

Wherefore, Plaintiffs pray that Defendants be cited to answer and appear herein and that

A. Each Plaintiff recover from the Browning Interests his titles, quiet his titles, remove the encumbrances from his title, and obtain partition of real property interests, all as sought by each Plaintiff hereinabove;

B. Each Plaintiff recover from Defendants his actual and exemplary damages as sought by each Plaintiff herein, together with pre-judgment interest, costs and attorneys fees;

C. Plaintiffs obtain declaratory relief and judgment as sought herein; and

D. A temporary restraining order be issued without notice restraining all Defendants, their agents, attorneys, servants and employees, from directly or indirectly:

1. Accepting or receiving from the Trustee any conveyance, assignment transfer or turnover of, or attempting in any way to obtain title, possession or control of, the home, homestead and farm of Brenda Holloway and Pat S. Holloway in Lee County, Texas or any oil and gas working interests acquired by the Trustee from Humble; and

2. Causing or permitting, or taking any action whatever which would or might cause or permit, any purchaser of or payor for production from or attributable to any property interest standing of record in any County of Texas in the name of Marcy Holloway, Catherine Gail Holloway, Patrick Lee Holloway, Pat S. Holloway as Trustee of Catherine Gail Holloway, or Pat S. Holloway as Trustee for Patrick Lee Holloway to cease, interrupt or suspend making payments of the proceeds thereof currently to any of these parties as such payments have heretofore been made;

and that Defendants be cited to appear and show cause and that upon such hearing a temporary injunction be issued enjoining Defendants as they have been temporarily restrained and granting such other temporary injunctive relief as to which Plaintiffs may show themselves entitled at such hearing, and that upon final hearing hereof a permanent injunction be issued granting to Plaintiff such injunctive relief as to which they may have shown themselves entitled; and

E. Plaintiffs have such other and further relief, at law or in equity, as to which they may show themselves entitled by this pleading or proper amendment.

Respectfully submitted,

LAW OFFICES OF
DALE OSSIP JOHNSON, P.C.

/s/ Dale Ossip Johnson
Dale Ossip Johnson
SBN #10700000
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Attorneys for Plaintiffs

APPENDIX E

NO. 8066

BENNIE C. JAEHNE, et al., Plaintiffs,	§	IN THE DISTRICT COURT OF LEE
v.	§	COUNTY, TEXAS 21st JUDICIAL DISTRICT
MICHAEL G. STARNES, et al., Defendants.	§	

NO. 8076

MARCY HOLLOWAY, et al., Plaintiffs,	§	IN THE DISTRICT COURT OF LEE
v.	§	COUNTY, TEXAS 21st JUDICIAL DISTRICT
JANE BROWNING, et al., Defendants.	§	

AMENDED PARTIAL JUDGMENT
AND ORDER OF SEVERANCE

CAME ON for hearing the Motion for Partial Summary Judgment of the Defendants Jane H. Browning, individually and as Co-Independent Executrix of the Estate of William W. Browning, Jr., Deceased; Michael G. Starnes, individually and as Co-Independent Executor of the Estate of William W. Browning, Jr., Deceased, and as Trustee for the Browning Children's Trust and as Special Trustee; Katherine (sic) Agnes Land Starnes, individually; Katherine (sic) Louise Browning Cook, individually; Averville Adams Browning Dawson, individually; William Webb Browning, III, individually; Winifred Fallon Browning Vaughn, individually; and Robert Holland

Browning, individually (hereafter collectively referred to as "the Browning Interests").

On April 3, 1991, the Court granted Browning Interests' Motion for Partial Summary Judgment, and entered its April 3, 1991 Partial Judgment and Order of Severance. Because the April 3, 1991 Judgment does not reflect the Court's holdings in this case, the Court hereby vacates its April 3, 1991 Judgment, and enters this Amended Partial Judgment and Order of Severance.

The Court finds that Plaintiffs Ted R. Ferguson, Humble Exploration Company, Inc. (now known as HECI Exploration Company) and Sterling Pipeline Company have non-suited all of their claims. Those claims are therefore dismissed without prejudice. Pat S. Holloway, individually, Pat S. Holloway as representative of the estate of Pat S. Holloway, and Pat S. Holloway as Trustee for Catherine Gail Holloway and Patrick Lee Holloway, Brenda Holloway, March Holloway, Catherine Gail Holloway, Patrick Lee Holloway, Stacey Holloway, and Shelly Holloway have nonsuited all of their claims asserting the invalidity or enforceability of the judgment rendered by the 162nd Judicial District Court of Dallas County, Texas in Cause No. 79-9623-I, styled *Jane H. Browning, et al. v. Pat S. Holloway, et al.* (hereinafter "the *Browning v. Holloway* Judgment"). Those claims are dismissed without prejudice. The Court further finds that Plaintiff Don Navarro, as Trustee of Pat S. Holloway, did not appeal from this Court's order of January, 1986, dismissing this cause of action and, therefore, he is no longer a party to this cause of action.

Having considered the Browning Interests' Motion for Partial Summary Judgment, the Opposition of Bennie C. Jaehne and Herman Jaehne to Motion for Partial Summary Judgment of the Browning Interests, the Reply of the Browning Interests to the Opposition of Bennie C. Jaehne and Herman Jaehne to Motion for Partial Summary Judgment, the summary judgment evidence, the pleadings, the record and the written and oral arguments of counsel, the Court finds that the Browning Interests' Motion for Partial Summary Judgment should be granted.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that Joe W. Holt take nothing and that his claims are dismissed with prejudice.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that Bennie C. Jaehne, Herman Jaehne, and Flojo Trading Corporation take nothing on any of their claims attacking the validity or enforceability of the *Browning v. Holloway* Judgment and all other claims against the Browning Interests, their agents, employees, attorneys or servants for conduct involved in the litigation of that cause of action, including any past or current enforcement efforts instituted by the Browning Interest (sic) in aid of the *Browning v. Holloway* Judgment. All such claims are hereby dismissed with prejudice.

Due to the multiple, interrelated and complicated nature of the pleadings on file in these consolidated cases, the Court is of the opinion that the severance of all undecided issues from those decided herein will expedite a just and fair adjudication of all claims and therefore ORDERS that any claims not decided and adjudicated herein are hereby severed into a new cause of action,

which shall be styled "Bennie C. Jaehne, et al. vs. Jane H. Browning, et al." The district clerk shall issue a new cause number and file this order in the jacket of such severed cause number. In order to clarify what issues will be pending in the severed case, the Plaintiffs are hereby ORDERED to file by May 3, 1991, in such severed cause number an amended petition setting forth any claims not adjudicated in this cause of action which they wish to pursue further. No claims in the severed cause of action shall attack the validity of the *Browning v. Holloway* Judgment or raise any other claims against the Browning Interests, their agents, employees, attorneys or servants for conduct involved in the litigation of that cause of action including any past or current enforcement efforts instituted by the Browning Interests. In the event any of the Plaintiffs do not file an amended petition in the severed cause by May 3, 1991, the severed cause shall be subject to dismissal.

SIGNED this 18 day of April, 1991.

/s/ Harold Towslee
Harold Towslee, Judge
21st District Court of Lee
County, Texas

APPENDIX F

IN THE COURT OF APPEALS,
THIRD DISTRICT OF TEXAS

AT AUSTIN

JUDGMENT RENDERED JULY 1, 1992

NO. 3-91-256-CV

FLOJO TRADING CORPORATION, HERMAN JAEHNE AND BENNIE C. JAEHNE V. JANE H. BROWNING, INDIVIDUALLY AND AS CO-INDEPENDENT EXECUTRIX OF THE ESTATE OF WILLIAM W. BROWNING, JR., DECEASED, AND AS TRUSTEE FOR THE BROWNING CHILDREN'S TRUST AND AS SPECIAL TRUSTEE; KATHERINE AGNES LAND STARNES, ET AL. APPEAL FROM 21ST DISTRICT COURT OF LEE COUNTY BEFORE JUSTICES JONES, KIDD AND B. A. SMITH; JUSTICE SMITH NOT PARTICIPATING AFFIRMED – OPINION BY JUSTICE KIDD

THIS CAUSE came on to be heard on the transcript of the record of the court below, and the same being considered, because it is the opinion of this Court that there was no error in the trial court's judgment: IT IS THEREFORE considered, adjudged and ordered that the judgment of the trial court be and is hereby in all things affirmed. It is FURTHER ordered that the appellant, Flojo Trading Corporation, as principal, and Bennie C. Jaehne of P. O. Box 726, Giddings, Texas 78942, and Herman Jaehne of 276 Sunrise, Giddings, Texas 78942, as sureties on the cost bond on appeal herein; and Herman Jaehne and Bennie C. Jaehne as principals, and Mark Jaehne of P. O. Box 726,

Giddings, Texas 78942, and Carolyn Jaehne of 276 Sunrise, Giddings, Texas 78942, as sureties on the cost bond on appeal herein, pay all costs of this appeal; and that this decision be certified below for observance.

APPENDIX G

IN THE COURT OF APPEALS,
THIRD DISTRICT OF TEXAS,
AT AUSTIN

NO. 3-91-256-CV

FLOJO TRADING CORPORATION, HERMAN JAEHNE AND BENNIE C. JAEHNE,

APPELLANTS

vs.

JANE H. BROWNING, INDIVIDUALLY AND AS CO-INDEPENDENT EXECUTRIX OF THE ESTATE OF WILLIAM W. BROWNING, JR., DECEASED, AND AS TRUSTEE FOR THE BROWNING CHILDREN'S TRUST AND AS SPECIAL TRUSTEE; KATHERINE AGNES LAND STARNES, ET AL.,

APPELLEES

FROM THE DISTRICT COURT OF LEE COUNTY, 21ST JUDICIAL DISTRICT

NO. 8066/8076, HONORABLE HAROLD TOWSLEE, JUDGE PRESIDING

PROCEDURAL BACKGROUND

This appeal springs from the unrelenting battle between the Holloways and the Brownings, which began in 1979. Although the complicated facts of this case and related cases already fill many pages of the state and

federal reporters,[1] for the sake of clarity, we recount only the pertinent events leading to this appeal.

On September 12, 1979, the Browning family (Brownings) initiated a suit against Pat Holloway, Humble Exploration Company (Humble), and others in the 193rd Judicial District Court of Dallas County, Texas. In that suit for fraud and breach of fiduciary duties, the Brownings claimed they were the equitable owners of substantially all of Humble's and Holloway's assets and sought to impose a constructive trust on those assets, as well as to collect actual and exemplary damages.

On May 26, 1982, a group of investors sued Holloway and Humble in the 162nd Judicial District Court of Dallas County, claiming that the defendants wrongfully "shut in" oil and gas wells jointly owned by the investors and Humble. Because the Brownings claimed ownership in

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[1] *See Browning v. Navarro*, 826 F.2d 335 (5th Cir. 1987); *Holloway v. Walker*, 784 F.2d 1287, *reh'g denied*, 790 F.2d 1170 (5th Cir. 1986); *Holloway v. Walker*, 765 F.2d 517 (5th Cir. 1985); *Browning v. Navarro*, 743 F.2d 1069 (5th Cir. 1984), *rev'g* 37 B.R. 201 (N.D. Tex. 1983); *Holloway v. Fifth Court of Appeals*, 767 S.W.2d 680 (Tex. 1989); *Browning v. Placke*, 698 S.W.2d 362 (Tex. 1985); *Starnes v. Holloway*, 779 S.W.2d 86 (Tex. App. 1989, writ denied); *Browning v. Ryan*, 756 S.W.2d 379 (Tex. App. 1988, orig. proceeding); *Humble Exploration Co. v. Browning*, 677 S.W.2d 111 (Tex. App. 1984), *en banc op. on motion to reinstate*, 690 S.W.2d 321 (Tex. App. 1985, writ ref'd n.r.e.), *cert. denied* 475 U.S. 1065 (1986); *Humble Exploration Co. v. Walker*, 641 S.W.2d 941 (Tex. App. 1982, orig. proceeding); *Humble Exploration Co. v. Fairway Land Co.*, 641 S.W.2d 934 (Tex. App. 1982, writ ref'd n.r.e.); *Browning v. Holloway*, 620 S.W.2d 611 (Tex. App.), *writ ref'd n.r.e. per curiam*, 626 S.W.2d 485 (Tex. 1981).

the Humble and Holloway assets, the Brownings were named as defendants in that case.

These two cases were consolidated and transferred to the 162nd Judicial District. Judge Dee Brown Walker then granted the Brownings' request for a separate and expedited trial of the 1979 case (the Browning case). After a month-long trial, Judge Walker rendered judgment *non obstante veredicto* in favor of the Brownings (the Walker judgment), imposing a constructive trust on Humble's and Holloway's assets and awarding the Brownings $72,000,000 in actual damages and $10,000,000 in exemplary damages.

In addition to judgment against Humble and Holloway, the Walker judgment awarded the Brownings judgment against a separate entity, Flojo Trading Corporation (Flojo), one of the appellants in this cause. It is uncontested that Flojo was not named as a party in the Browning case, was never served with any pleadings in that case, and never appeared before Judge Walker. The Walker judgment nevertheless contained findings of fact that Flojo was the alter-ego of Pat Holloway, and that Flojo was formed and operated in bad faith to defraud the Brownings.[2] The Walker judgment then imposed a constructive trust on one hundred percent of Flojo's stock and ordered that Flojo, along with Pat Holloway, Humble, Holloway Exploration Company, and Sterling

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[2] Because the record in this present appeal does not contain the pleadings or statement of facts from the Browning case, we must presume that they would support the trial court's judgment. *See Haynes v. McIntosh*, 776 S.W.2d 784, 785 (Tex. App. 1989, writ denied).

Pipeline Company, was jointly and severally liable for $70,000,000 of the total judgment awarded the Brownings. Holloway appealed the Walker judgment and also pursued collateral attacks and bill of review proceedings in several courts.

The present appeal originates from a 1985 collateral attack on the Walker judgment, brought in Lee County by Pat Holloway, Flojo, Bennie and Herman Jaehne (the Jaehnes), and several Holloway family members. The Lee County district court initially declared the Walker judgment void on the grounds that certain indispensable parties were not joined in that suit. The Texas Supreme Court overruled that action by a conditional grant of writ of mandamus which held that the failure to join indispensable parties does not render a judgment void. *See Browning v. Placke*, 698 S.W.2d 362 (Tex. 1985). After vacating the order that declared the Walker judgment void, the Lee County district court then entered another order dismissing the cause for want of jurisdiction. This Court, in a 1987 unpublished opinion, held that the Lee County district court erred in dismissing the cause for want of jurisdiction and remanded the matter to the trial court for a disposition of all of the causes of action pleaded by the parties. *Jaehne v. Starnes*, No. 14,693 (Tex. App., Sept. 23, 1987, no writ).

On remand to the Lee County District Court, both Flojo and the Brownings filed motions for partial summary judgment in 1991.[3] The trial court granted the

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[3] In a bill of review proceeding, the Dallas district court enjoined Holloway and all persons acting in concert with Holloway from instituting or pursuing any further collateral attacks on the Walker judgment in any court. Holloway and his family

Brownings' motion, and Flojo and the Jaehnes (Appellants) now appeal.

ANALYSIS

A. The Brownings' 1991 Motion for Partial Summary Judgment.

In their 1991 motion, the Brownings moved for partial summary judgment against Flojo and the Jaehnes on their claims attacking the validity of the Walker judgment, asserting the following grounds: (1) the doctrines of res judicata, collateral estoppel, or law of the case bar all of the plaintiffs' collateral attacks on the Walker judgment; (2) the judgment in *Holloway v. Starnes*, No. 86-07704-I, in the Dallas County district court permanently enjoined Pat Holloway and all persons acting in concert with him from pursuing any claims attacking the validity of the Walker judgment; (3) the judgment of the United States district court in *Browning v. Navarro*, No. 83-0380-H, enjoined Pat Holloway and all persons acting in concert with him from attempting to re-litigate any claim or legal issues which could have been asserted in *Holloway v. Walker* or in *Browning v. Navarro*; (4) the plaintiffs' allegations include non-jurisdictional matters which do not support a collateral attack; (5) the jurisdictional recital in the Walker judgment is conclusive and

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members therefore non-suited themselves in this cause in February 1991. The remaining parties, Flojo and the Jaehnes, who own approximately thirty-seven percent of Flojo's stock, continue to press their claims that the Walker judgment is void as to Flojo, the Jaehnes, Holloway, and Humble.

cannot be contradicted in this collateral attack; and (6) Flojo cannot sue or defend a suit in state court because its charter was revoked for failure to pay franchise taxes.

Flojo did not respond to the Brownings' motion for summary judgment. The Jaehnes opposed the Brownings' motion only on the basis that neither Flojo nor any of its legal or beneficial stockholders was named as a defendant, served with process, or appeared in the original Browning case that resulted in the Walker judgment. Thus, appellants presented to the trial court no rebuttal to the Brownings' grounds for summary judgment and established no fact issues regarding any of the Brownings' grounds for summary judgment. Without indicating the specific grounds for granting summary judgment, the trial court ordered that Flojo and the Jaehnes take nothing on any of their claims attacking the validity of the Walker judgment.

On appeal, appellants assert in their first point of error that the trial court erred in granting the Brownings' motion for partial summary judgment because appellants were not named as defendants or served with process in the original Browning case in which Judge Walker entered judgment against Flojo. Although this assertion is uncontested and would normally support a collateral attack on a judgment, it cannot now serve as a basis for this Court to reverse this summary judgment. We will explain.

We acknowledge that a judgment may not properly be entered against a party who is not before the trial court. *Mapco, Inc. v. Carter*, 817 S.W.2d 686, 686 (Tex. 1991). When a court has no jurisdiction over the parties or

property, no jurisdiction over the subject matter, or no jurisdiction to enter the particular judgment entered, that court's judgment is void and subject to collateral attack in another court of equal jurisdiction. *See Browning v. Placke*, 698 S.W.2d 362, 363 (Tex. 1985); *Austin Indep. Sch. Dist. v. Sierra Club*, 495 S.W.2d 878, 881 (Tex. 1973); *see generally* Gus M. Hodges, *Collateral Attacks on Judgments*, 41 Tex. L. Rev. 163 (1962).

Because lack of jurisdiction is a fundamental error which may be raised for the first time on appeal, this Court could normally consider appellants' assertion that judgment against them was void because they were not parties to the original Browning case. *See Mapco*, 817 S.W.2d at 687. But we may not now review whether the Walker judgment is void as to appellants, since one of the stated grounds in the Brownings' motion for summary judgment was that all of Flojo's and the Jaehnes' grounds for this collateral attack on the Walker judgment have been litigated in other cases; thus, the doctrines of res judicata, collateral estoppel, and law of the case bar the present collateral attack.

Because appellants have litigated these same issues before another court in a collateral attack and bill-of-review proceeding and the issues have been decided against appellants, they may not continue to re-urge the same matters in other courts of equal jurisdiction until they obtain a result favorable to them. Once parties litigate issues in a fair forum, that result should be binding. *Scurlock Oil Co. v. Smithwick*, 724 S.W.2d 1, 6 (Tex. 1986). Yet appellants made no effort to challenge in a response to the Brownings' motion the contention that their collateral attack is barred. Appellants' failure to challenge the

Brownings' grounds for partial summary judgment at the trial level, combined with the single point of error appellants now assert regarding the trial court's granting of summary judgment, leaves this Court unable to look behind the summary judgment and fully determine whether the doctrines of res judicata, collateral estoppel, and law of the case are in fact a bar to this collateral attack.

Appellants could have cured their failure to respond to the Brownings' asserted grounds for summary judgment by urging this Court to reverse the summary judgment on the basis that the Brownings' motion was insufficient as a matter of law to support summary judgment. *See City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 679 (Tex. 1979). Appellants did not do so.

Appellants also could have asserted a general point of error that the trial court erred in granting summary judgment, allowing argument as to all possible grounds upon which the trial court should have denied summary judgment. *See Malooly Bros., Inc. v. Napier*, 461 S.W.2d 119, 121 (Tex. 1970). As noted, appellants did not pursue this option, but merely re-urged on appeal their original position that the Walker judgment is void as to them because appellants were not named as defendants or served with process in the original Browning case.

Mindful of the need to construe a point of error broadly to favor a just and equitable result, we have reviewed appellants' brief for arguments which are not framed as points of error but which could defeat the Brownings' summary judgment. *See Holley v. Watts*, 629 S.W.2d 694, 696 (Tex. 1982). Appellants offer a partial

response to the Brownings' assertions that res judicata, collateral estoppel, and law of the case bar the present collateral attack. Specifically, appellants contend that the judgment in *Holloway v. Starnes*, No. 86-07704-I, in the Dallas District Court of Dallas County, 162nd Judicial District (the Dallas Bill of Review) does not preclude the present collateral attack. The judgment in the Dallas Bill of Review denied all of plaintiffs' claims and permanently enjoined Pat Holloway and all persons acting in concert with him from pursuing any claims attacking the validity of the Walker judgment. Flojo was a plaintiff in the Dallas Bill of Review.

Appellants now argue that Flojo could not have participated in the Dallas Bill of Review because Flojo's charter had been revoked for failure to pay franchise taxes. Appellants note that if corporate privileges are forfeited, a corporation loses the right to sue or defend in a court of this state. *See* Tex. Tax Code Ann. § 171.252 (1982). Because Flojo had forfeited its charter and corporate privileges, appellants argue that Flojo did not have a full and fair opportunity to litigate its claims in the Dallas Bill of Review. They contend that the judgment in that suit therefore cannot operate as a bar to the present cause.

We believe that Flojo is estopped to make this argument. The record reflects that Flojo forfeited its identification number in September 1982, and its charter in February 1984, for failure to pay its franchise taxes. This forfeiture does not appear to be the Brownings' fault, as appellants claim in their brief, because the Brownings did not obtain control of Flojo's records until September 1986. Holloway, along with Flojo and the Jaehnes, filed the Lee

County collateral attack in 1985. Then Holloway filed *Holloway v. Starnes*, the Dallas Bill of Review, in 1986 in the Dallas district court. As noted, Flojo was a named plaintiff in that suit. Thus, these two suits were essentially parallel attacks on the validity of the Walker judgment, and both were initiated at a time when Flojo's charter was revoked.

Nothing in the record suggests that Flojo attempted to remove itself as a party in the Dallas Bill of Review. Further, nothing in the record suggests that Flojo or the Jaehnes attempted to revive Flojo's charter during the entire time the Dallas Bill of Review was pending before the 162nd District Court. Only after the Dallas district court rendered a judgment on January 10, 1991, which permanently enjoined any further attacks on the validity of the Walker judgment, did Flojo assert its inability to participate in the Dallas Bill of Review. At that time, Joe Holt, Flojo's president, paid the overdue fees, taxes, and penalties, and had Flojo's charter reinstated on March 4, 1991. Four days later Flojo filed its motion for partial summary judgment in the present cause.

Flojo is estopped from taking inconsistent positions in these judicial proceedings. *Cf. Smith v. Chipley*, 42 S.W.2d 645, 647 (Tex. Civ. App. 1941, writ ref'd n.r.e.). We do not believe that Flojo should be allowed to participate as a plaintiff in the Lee County collateral attack from 1985 until 1991, and in the Dallas Bill of Review from 1986 until 1991, and then, one month before the suit is resolved in Lee County, pay the franchise tax, claim that Flojo heretofore had not been a plaintiff in either suit, and attempt to escape the effects of the Dallas judgment. The

record does not reflect why Flojo made no move to reinstate its charter at an earlier time. But allowing Flojo to switch its position at the eleventh hour would permit this corporate plaintiff to escape the res judicata effects of an unfavorable judgment on the basis of *its own failure to pay its franchise-tax obligation*. *Cf. Hardwick v. Austin Galleries*, 779 S.W.2d 438, 441 (Tex. App. 1989, writ denied).

We therefore reject appellants' argument that the judgment in the Dallas Bill of Review is not a bar to the present collateral attack. Moreover, we note that appellants did not respond in full to the argument in the Brownings' motion for partial summary judgment that res judicata, collateral estoppel, and law of the case bar the present collateral attack.

Appellants' failure to assert a general assignment of error or specifically challenge all of the grounds for summary judgment is fatal to their appeal. An examination of the Brownings' motion reveals several possible bases for the trial court's judgment, only one of which is that res judicata, collateral estoppel, and law of the case bar the present collateral attack. This summary judgment must stand, since it may have been based on a ground appellants did not specifically challenge and since there was no general assignment that the trial court erred in granting summary judgment. *See Malooly Bros.*, 461 S.W.2d at 121. Accordingly, we overrule this point of error.

B. Flojo's 1991 Motion for Summary Judgment.

In their second point of error, appellants assert that the trial court erred in denying Flojo's 1991 motion for

partial summary judgment. However, nothing in the record reflects that the trial court ever denied – or even heard – Flojo's motion. In fact, the record reflects that the trial court rendered judgment on the Brownings' motion even before the date set for the hearing on Flojo's motion.

Appellants contend, however, that the district court denied their motion for partial summary judgment in that same judgment granting the Brownings' motion. That judgment ordered that appellants take nothing on any of their claims attacking the validity of the Walker judgment and dismissed those claims with prejudice. The judgment then severed all of appellants' undecided issues into a new cause of action. We cannot agree with appellants that the trial court's action overruled appellants' motion for summary judgment by implication. *See Starnes v. Holloway*, 779 S.W.2d S.W.2d 86, 98 (Tex. App. 1989, writ denied).

The judgment granting the Brownings' motion states that the court considered the following in reaching its decision:

> [T]he Browning Interests Motion for Partial Summary Judgment, the opposition of Bennie C. Jaehne and Herman Jaehne to Motion for Partial Summary Judgment of the Browning Interests, the Reply of the Browning Interests to the Opposition of Bennie C. Jaehne and Herman Jaehne to Motion for Partial Summary Judgment, the summary judgment evidence, the pleadings, the record and written and oral arguments of counsel. . . .

Nowhere does the judgment address Flojo's motion for partial summary judgment. Given the trial court's specificity in listing the motions and pleadings it considered in rendering judgment, we conclude that the trial court did not hear or rule on Flojo's motion.

The record does not reflect that appellants objected to the trial court's failure to rule on their motion. Where there is no ruling on a motion and no objection to the trial court's refusal to rule, the error, if any, is not preserved. Tex. R. App. P. Ann. 52(a) (Pamph. 1992); *see also Starnes*, 779 S.W.2d at 98; *Lynch v. Bank of Dallas*, 746 S.W.2d 24, 24-25 (Tex. App. 1988, writ denied). Further, the trial court's refusal to hear a motion for summary judgment is not an error that can be cured on direct appeal. *See Starnes*, 779 S.W.2d at 98.

We note that the facts in this cause are distinguishable from a situation in which both parties moved for summary judgment and one motion was granted, but the other denied. In that case, the appellate court should determine all questions presented and, if it finds reversible error in the judgment, reverse the trial court and render such judgment as the trial court should have rendered, including judgment for the other movant. *See Jones v. Strauss*, 745 S.W.2d 898, 900 (Tex. 1988).

Because appellants failed to obtain a ruling on their motion and failed to preserve error, this Court cannot consider issues related to Flojo's motion for partial summary judgment. Accordingly, we overrule this second point of error.

C. The 1985 Motions for Partial Summary Judgment.

In points of error three through six, appellants complain that the trial court erred in denying four motions for partial summary judgment that Holloway filed in 1985 when the parties first brought this collateral attack in the Lee County district court. The trial court heard these motions in 1985, along with a number of other pleadings and motions, and rendered judgment dismissing the cause for want of jurisdiction one year later.

As noted, this Court ruled in a 1987 unpublished opinion that the Lee County district court erred in dismissing the cause for want of jurisdiction and remanded the matter to the trial court. That opinion did not address the denial of any of appellants' 1985 motions for summary judgment.

On remand, the parties filed in 1991 the motions for partial summary judgment that form the basis of the first two points of error in this appeal. Nothing in the record reflects that appellants re-urged the 1985 motions complained of in points of error three through six. Thus, the trial court could not have considered the 1985 motions in the 1991 judgment that led to the current appeal.

We believe that appellants, having failed to re-urge these four motions after remand, may not resurrect them now on appeal. Appellants provide us with no authority to the contrary. For the reasons set forth in our second point of error, these issues have not been properly preserved on this appeal. Accordingly, we overrule these points of error.

CONCLUSION

We will affirm the judgment of the trial court.

Mack Kidd, Justice

[Before Justices Jones, Kidd and B. A. Smith; Justice Smith not participating]

Affirmed

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